9

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 62.

GEORGE DICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

FILED JULY 6, 1906.

(20,303.)

(20,303.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 338.

GEORGE DICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

INDEX.

	Original.	Print.
Indictment	1	1
Demurrer to indictment	2	2
Defendant's requests	3	3
Verdict	4	4
Motion in arrest of judgment	4	4
Order extending time to settle bill of exceptions	5	5
Arraignment and plea	6	6
Order overruling demurrer	6	6
Trial and verdict	6	6
Order denying motion in arrest of judgment, &c	7	7
Judgment	7	7
Notice of motion for new trial	8	9
Motion for new trial	9	10
Bill of exceptions	10	11
Indictment	10	11
Demurrer	11	12
Order overruling demurrer	12	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 3, 1906.

	Original.	Print.
Testimony of Te-We-Talkt	13	14
F. G. Mattoon	14	15
Watch-le Amnee	15	16
Johnnie Yo-Gay-Nil	15	16
Edward Baboin	15	16
George Dick	15	17
Defendant's requests (not set out)	16	17
Charge	16	17
Exceptions to charge and refusal to charge	16	18
Verdict and exception	17	18
Motion in arrest of judgment	17	19
Notice of motion for new trial	18	20
Motion for new trial	19	21
Order as to time to file bill of exceptions	19	22
Specifications of error	20	22
Judge's certificate to bill of exceptions	22	24
Opinion	23	25
Order denying motion for new trial	25	27
Assignment of errors	26	28
Writ of error	30	31
Citation and service	31	31
Clerk's certificate	32	32

1 *Indictment.*

In the District Court of the United States within and for the District of Idaho, May Term, 1905.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Indictment. Violation Sec. 2139, R. S., as Amended, 29 Stat., p. 506. Introducing Liquor on Indian Reservation.

George Dick is accused by the grand jurors of the United States of America, within and for the district of Idaho, having been duly summoned, empannelled, and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

That the said George Dick, at the county of Nez Perces, within the district of Idaho, and within the jurisdiction of this court, on the 15th day of March, 1905, then and there being, did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown) into the Indian country, to wit, into and upon the Nez Percé Indian Reservation in the said county of Nez Perces, against the peace and dignity of the United States, and contrary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States District Attorney, District of Idaho.

A. O. CHRISTENSON,
Foreman of the Grand Jury.

2 Names of witnesses examined before the United States grand jury upon finding the foregoing indictment. Te-we-talkt, F. G. Mattoon, Wates-la-om-neen, Johnie-Go-hoy-uit.

(Endorsed:) No. 565. In the District Court of the United States within and for the District of Idaho. The United States of America *vs.* George Dick. Indictment. Violation Sec. 2139, R. S., as amended, 29 Stat., p. 506. Presented by the foreman in the presence of the grand jury and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk. A. O. Christenson, foreman grand jury.

Demurrer.

In the District Court of the United States within and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Demurrer.

Comes now the said defendant and demurs to the indictment on file herein and for cause and grounds of demurrer alleges and shows to the court:

First. That the grand jury returning said indictment had no legal authority to inquire into the offense charged, by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said complaint:

a. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perces or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as "The Nez Perce Indian Reservation." That the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as "The Nez Perce Indian Reservation" was, by the act of the Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished. That the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States; and further, that the said former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in said indictment, been opened for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State. That various town sites within the boundaries of said former reservation had been settled by
3 citizens and that title thereto transferred from the United States to the inhabitants. Municipal governments, namely, villages, had been organized and were in existence within the said boundaries of said former reservation and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country, or lands reserved for the use and occupa-

tion of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the authority or control in nature of the guardianship of the person.

Second. That said indictment does not substantially conform to the requirements of sections 7877 and 7879 of the revised statutes of Idaho in that the facts and acts constituting the offense charged are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain, and its statement of particular circumstances of the offense charged for the reason that the words "Nez Perce Indian Reservation" is not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are not sufficient to constitute any offense against the laws of the United States, nor any offense within the jurisdiction of this court.

Dated this 11th day of May, A. D. 1905.

FOGG & NUGENT,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States within and for the District of Idaho. The United States of America *vs.* George Dick. Demurrer. Filed May 11th, 1905. A. L. Richardson, clerk.

Defendant's Requests.

In the United States District Court for the District of Idaho.

UNITED STATES OF AMERICA
vs.
GEORGE DICK.

No. 1.

I instruct you, gentlemen, that notwithstanding you may find from the evidence that the defendant, George Dick, had intoxicating liquor in his possession within the Nez Perce Indian Reservation, or Indian country, still if you further find from the evidence in this case that the defendant did not introduce said liquor into the Nez Perce Indian Reservation, or Indian country, or upon an Indian allotment, then your verdict must be not guilty.

Refused.

4 No. 2.

And I further instruct you that unless you find from the evidence in the case that the defendant brought the said liquor from a point or place from without the limits of the Nez Perce Indian Reservation, or Indian country, into the boundaries of the said Indian reservation, or Indian country, then your verdict must be not guilty.

Refused.

No. 3.

I instruct you, gentlemen, to find the defendant, George Dick, not guilty.

Refused.

(Endorsed:) No. 565. U. S. District Court, District of Idaho. The United States *vs.* George Dick. Defendant's requests. Field May 15th, 1905. A. L. Richardson, clerk.

Verdict.

United States District Court, Northern Division, District of Idaho.

THE UNITED STATES
vs.
GEORGE DICK.

Verdict.

We, the jury in the above entitled cause, find the defendant guilty as charged in the indictment.

C. A. HAGEN, *Foreman.*

(Endorsed:) No. 565. U. S. District Court, Northern Division, District of Idaho. The United States *vs.* George Dick. Verdict. Filed May 15th, 1905. A. L. Richardson, clerk.

Motion in Arrest of Judgment.

In the District Court of the United States, in and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Motion in Arrest of Judgment.

Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction, upon verdict of the jury herein, for the reasons:

1st. That the indictment herein does not state facts sufficient to

constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any laws of the United States.

2nd. That this court has not jurisdiction over the person of this defendant nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States; but, to the contrary, it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho, and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States had no power to pass a law providing for police regulations over the matters and things alleged in said indictment within the territory of the State of Idaho or over the place where said offense is said to have been committed.

Wherefore the defendant prays that judgment upon the said plea and conviction of "Guilty" be arrested and that he be discharged.

Dated this 13th day of May, A. D. 1905.

F. E. FOGG & G. W. TANNAHILL,
Attorneys for Defendant.

(Endorsed:) No. 565. In the District Court of the United States in and for the District of Idaho. The United States of America *vs.* George Dick. Motion in arrest of judgment. Filed May 16, 1905. A. L. Richardson, clerk.

Order Extending Time to Settle Bill of Exceptions.

In the District Court of the United States in and for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Order Extending Time to Settle Bill of Exceptions.

It appearing to the court that additional time is necessary for the defendant to prepare and present a bill of exceptions taken during the trial for settlement:

It is therefore ordered that the defendant's time for preparing, presenting, and serving upon the district attorney a bill of exceptions thereof upon the trial of the cause, including exceptions taken to the overruling of the demurrer and exceptions to the order of the court overruling and denying defendant's motion and arrest of judgment and all the exceptions taken upon the trial, and the admission and rejection of evidence, and to the instructions of the court, be extended for sixty days from the date of this order.

Done in open court this 16th day of May, A. D. 1905.

JAS. H BEATTY, *Judge.*

(Endorsed:) No. 565. In the District Court of the United States, District of Idaho, Northern Division. The United States of America *vs.* George Dick. Order extending time to settle bill of exceptions. Filed May 16, 1905. A. L. Richardson, clerk.

6 *Journal Entries.*

At a stated term of the District Court of the United States for the District of Idaho, Northern Division, held at Moscow, Idaho, on Wednesday the 10th day of May, 1905:

Present: Hon. Jas. H. Beatty, judge.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

On this day the defendant herein was brought into court to be arraigned upon the true bill of indictment heretofore presented against him by the grand jury. Being asked if George Dick was his true name, the defendant stated that it was. The formal reading of the indictment was waived and defendant furnished with a true copy thereof by order of court at the expense of the United States. Being asked for his plea, the defendant pleaded that he is not guilty of the offense charged in the indictment.

SATURDAY, *the 13th day of May*, 1905.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

On this day the court announced its decision upon the demurrer to the indictment herein, heretofore argued and submitted. Ordered that said demurrer be and the same is hereby overruled.

MONDAY, *the 15th day of May*, 1905.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

Now on this day this cause came on regularly to be heard and tried before the court and jury, N. M. Ruick, U. S. district attorney, appearing as counsel for the plaintiff, and F. E. Fogg and Geo. W. Tannahill, esqrs., on behalf of defendant, said defendant being in court in person. The clerk under direction of the court proceeded to draw

from the jury box the names of twelve persons, one at a time, to serve as a jury in said cause, and the following are the names of the persons drawn from the box, sworn on *voir dire*, passed upon, accepted by the counsel for the respective parties, and sworn by the clerk to well and truly try said cause and a true verdict render therein according to the law and the evidence, to wit: Warren P. Hunt, Jno. E. Randall, H. C. Grice, J. L. Miller, W. H. Simpson, Geo. Brewster, Frank Hart, Geo. P. Thompson, Jesse Reeves, C. A. Hagen, R. S. Mathews, & D. H. Robinson.

The clerk read the indictment to the jury and stated the defendant's plea. Ed. Raboin was sworn as interpreter.

The following named persons were sworn, examined, and cross-examined as witnesses on behalf of plaintiff, to wit: Te-we-talkt, through the interpreter, F. G. Matoon, John Dickson, through the interpreter, John-Yo-hoy-wit, through the interpreter, and Ed. Raboin, and the plaintiff rests.

7 George Dick was sworn and examined on his own behalf, and the defense rests and the evidence closed. The said cause was thereupon submitted without argument and said jury, after being instructed by the court, retired to their room to consider of their verdict in charge of an officer of the court duly qualified.

Now came the jury all called and found to be present the respective attorneys of record and the defendant in person being in court. Being asked if they had agreed upon a verdict they, through their foreman, presented their written verdict in the words following, to wit:

"United States District Court, Northern Division, District of Idaho.

"THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Verdict.

"We the jury in the above-entitled cause find the defendant guilty as charged in the indictment.

"C. A. HAGEN, *Foreman.*"

TUESDAY, *the 16th day of May*, 1905.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

Now came the defendant in person and by his counsel, F. E. Fogg, esqr., and thereupon the defendant's motion in arrest of judgment herein was submitted to the court, and upon consideration it is ordered that said motion be, and the same is hereby, denied,

to which ruling the said defendant by his said counsel then and there excepted in due form of law, and it is ordered that said defendant do pay a fine of $100.00 and costs, and that he be imprisoned in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days.

It is further ordered that execution be stayed herein for a period of sixty days, or during the further order of the court or judge thereof upon the deposit with the clerk of $400.00 cash as security for defendant's appearance when ordered by the court or judge.

In the District Court of the United States for the Northern District of the District of Idaho, May Term, A. D. 1905.

No. 565. Convicted of Introducing Intoxicating Liquors into the Indian Country.

THE UNITED STATES
against
GEORGE DICK.

Present: Hon. Jas. H. Beatty, Judge.

Now, on this 16th day of May, 1905, the United States district attorney, with the defendant and his counsel, F. E. Fogg, esqr., came into court; the defendant was duly informed by the court of the nature of the indictment found against him for the crime of introducing intoxicating liquors into the Indian country committed on the 15th day of March, A. D. 1905, of his arraignment and
8 plea of "Not guilty as charged in said indictment," of his trial and the verdict of the jury on the 15th day of May, A. D. 1905, "Guilty as charged in the indictment." The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court.

Now, therefore, the said defendant having been convicted of the crime of introducing intoxicating liquors into the Indian country

It is hereby considered and adjudged that the said defendant, George Dick, do pay a fine of one hundred (100) dollars, and the costs of this action taxed at one hundred eight and 40/100 dollars, and that he stand committed until said fine is paid.

And that he be imprisoned and kept in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days; and it is further ordered and adjudged that said defendant be, and is hereby, remanded to the custody of the United States marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Endorsed:) In the District Court of the United States for the District of Idaho. Judgment roll No. 565. The United States *vs.* George Dick. Filed May 15th, 1905. A. L. Richardson, clerk.

Notice of Intention to Move for a New Trial.

In the District Court of the United States in and for the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Notice of Intention to Move for a New Trial.

To the plaintiff above named and to N. M. Ruick, district attorney, and by virtue thereof attorney for plaintiff, and to each of you:

Take notice, that the defendant above named intends to and will move the above-entitled court to vacate and set aside the verdict rendered in the above-entitled cause, on the 15th day of May, A. D. 1905, and to grant a new trial of said cause upon the following grounds, to wit:

1.

Insufficiency of the evidence to justify the verdict and that the same is against law.

2.

Errors of law occuring at the trial and excepted to by the defendant.

3.

Errors of law occurring in the instructions of the court, wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of
9 the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

4.

Errors of law in overruling the defendant's demurrer to the indictment herein, and overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and verdict returned and filed in said cause.

Said motion will be made and based upon a statement of the case to be hereafter prepared and served, settled and filed, upon the indictment heretofore filed herein, and upon the defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above entitled cause.

F. E. FOGG,
GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States, Northern Division, District of Idaho. The United States of America, plaintiff, *vs.* George Dick, defendant. Notice of intention to move for a new trial. Filed May 24th, 1905. A. L. Richardson, clerk. By H. C. Shaver, deputy.

Motion for a New Trial.

In the District Court of the United States, in and for the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Motion for a New Trial.

Comes now the defendant above named, pursuant to notice heretofore given, and moves the court that the verdict, rendered in the above-entitled cause on May 15, 1905, be set aside and vacated, and a new trial granted therein upon the following grounds:

1.

Insufficiency of the evidence to justify the verdict, and that the same is against law.

2.

Errors of law occurring at the trial and excepted to by the defendant.

3.

Errors of law occurring in the instructions of the court wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

4.

10 Errors of law in overruling the defendant's demurrer to the indictment herein and in overruling defendant's motion in arrest of judgment and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

This motion will be made and based upon a statement of the case to be hereafter prepared and served, the indictment heretofore filed herein, defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

F. E. FOGG AND
GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States, in and for the District of Idaho, Northern Division. May term, 1905. The United States of America, plaintiff, *vs.* George Dick, defendant. Motion for a new trial. Filed May 24th, 1905. A. L. Richardson, clerk. By H. C. Shaver, deputy.

Bill of Exceptions.

In the United States District Court for the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Bill of Exceptions and Statement of Case.

Be it remembered that upon the 10th day of May, 1905, the defendant was indicted by the grand jury in the above-entitled court, charged with violation of section 2139, R. S., U. S., amended by 29 Statute, page 506, which indictment is as follows:

"In the District Court of the United States, within and for the District of Idaho. May term, 1905. The United States of America *vs.* George Dick. Indictment. Violation sec. 2139, R. S., as amended 29 Stat., p. 506.

"George Dick is accused by the grand jurors of the United States of America, within and for the District of Idaho, having been duly summoned, empanelled and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

"That the said George Dick at the county of Nez Perces, within the District of Idaho and within the jurisdiction of this court, on the 15th day of March, A. D. 1905, then and there being, did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown), into the Indian country, to wit, into and upon the Nez Perce Indian Reservation in the said county of Nez Perces; against the peace and dignity
11 of the United States and contrary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States District Attorney, District of Idaho.

A. O. CHRISTENSON,
Foreman of the United States Grand Jury.

Names of witnesses examined before the United States grand jury upon finding the foregoing indictment: Te-we-Talkt, Watts-la-omneen, Johnie Yo-Gay-Nil, F. G. Matoon.

(Endorsed:) No. 565. Presented by the foreman in presence of the grand jury and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk. A. O. Christenson, Foreman Grand Jury.

Be it further remembered that thereafter, on the 13th day of May, 1905, the defendant filed in said court his demurrer to said indictment, which demurrer is as follows:

"In the District Court of the United States within and for the District of Idaho. The United States of America *vs.* George Dick.

"Comes now the said defendant and demurr*ers* to the indictment on file herein and for cause and grounds of demurrer alleges and shows to the court:

"First. That the grand jury returning said indictment had no legal authority to inquire into the offense charged by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said complainant:

"A. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perces or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as 'The Nez Perce Indian Reservation:' that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as 'The Nez Perce Indian Reservation' was, by the act of Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the land included within the boundaries of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said land in severalty to the individual Indians and by the purchase of the balance thereof by the United States and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States, and, further, that the said former reservation known and designated as 'The Nez Perce Indian Reservation' had, prior to the time of the commission of the acts mentioned in said indictment, been open for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State; that various town sites within the boundaries of said former reservation had been settled by citizens
12 and that title thereto transferred from the United States to the inhabitants. Municipal governments, namely, villages, had been organized and were in existence within the boundaries of said former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country or lands reserved for the use and occupation of Indians, or occupied by any Indians maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, and of the authority or control, in nature of the guardianship of the person.

"Second. That said indictment does not substantially conform to the requirements of sections 7677 and 7679 of the revised statutes of Idaho in that the facts and acts constituting the offense charged

are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain in its statements of particular circumstances of the offense charged for the reason that the words 'Nez Perce Indian Reservation' *is* not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

"Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are not sufficient to constitute any offense against the laws of the United States, or any offense within the jurisdiction of this court.

"Dated this 11th day of May, A. D. 1905.

F. E. FOGG &
GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) Filed May 13, 1905. A. L. Richardson, clerk.

Be it further remembered that thereafter said demurrer was duly argued and submitted to the court for decision and the court then and there, on the 13th day of May, 1905, overruled said demurrer and made and entered its order denying the same, which is as follows:

"In the United States District Court of the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Order Overruling Demurrer.

"This cause came on to be heard this 13th day of May, 1905, at 3.00 o'clock p. m., upon the defendant's demurrer to the indictment herein, F. E. Fogg and Geo. W. Tannahill appearing for defendant in support of said demurrer and N. M. Ruick, district attorney, appearing in opposition thereto. After hearing arguments of respective counsel and being fully advised in the premises the court overruled said demurrer.

"Now, therefore, by reason of the law and the premises aforesaid the court orders that said demurrer be and the same hereby is overruled and it is so ordered, to which defendant excepted and exception allowed.

JAS. H. BEATTY,
District Judge."

(Endorsed:) Filed May 13th, 1905. A. L. Richardson, clerk.

13 Be it further remembered that the defendant, George Dick, then and there excepted to the ruling of the court in overruling said demurrer, which exception was at the time allowed.

Be it further remembered that thereafter and on the 15th day of May, 1905, and after the filing of said demurrer and the order overruling the same, the defendant, reserving his exceptions to said demurrer and to the jurisdiction of the court as argued in said demurrer, pleaded not guilty to the said charge in said indictment.

Be it further remembered that thereafter and on the 15th day of May, 1905, this cause came on regularly for trial upon said indictment and the defendant's plea of not guilty thereto, whereupon a jury was regularly sworn and empanelled to try said cause, N. M. Ruick, esqr., United States District Attorney, appearing for the prosecution, and F. E. Fogg and Geo. W. Tannahill, esqrs., appearing as attorneys for the said defendant.

Be it further remembered that thereupon the following proceedings, and none other, were had, and the following testimony and proof, and none other, was had upon the trial of said cause.

TE-WE-TALKT was called and sworn as a witness on behalf of the United States, and upon direct examination by the United States Attorney was asked the following question:

"You are a Nez Perce Indian, living on the Nez Perce Indian Reservation?"

Which question was then and there objected to by the counsel for the defendant, for the reason that the indictment does not state facts sufficient to constitute any public offense nor any offense against any law of the United States, and particularly that the said indictment does not allege that any liquor was introduced into the Indian country, or upon any Indian allotment from any place without such Indian country or without such Indian allotment; and further, that the facts stated in said indictment do not establish any violation of any law of the United States, and particularly do not establish a violation of section 2139 of the Revised Statutes, as amended by 29 Statute- at Large, page 506, and that the said statute, inasfar as it assumes to publish as an offense against the laws of the United States the bringing of liquor into any territory within the limits of this State not within the Indian country and not reserved by the Government for the exclusive use of the Indians is unconstitutional and void, and for the further reason that this court has no jurisdiction over the subject-matter of the offense charged or attempted to be alleged in the indictment, nor over the person of this defendant, for the reasons above stated.

Which objection was then and there overruled by the court, and the witness permitted to answer said question, to which ruling and decision of the court the defendant, by his counsel, then and there excepted, which exception was at the time allowed by the court.

Whereupon the witness, in answer to said question, testified further as follows: "Yes, sir."

And thereupon the said witness, upon direct examination by the United States attorney, further testified as follows:

"I got the bottle of whiskey that Mr. Mattoon, the agent, took

away from me on the 13th of March, from George Dick. I
14 bought it at Culdesac. Dick, the defendant, gave it to me. The bottle now shown me is the bottle. The agent took this away from me. Dick paid for this whiskey. I and Walter Slominee furnished the money. I furnished four dollars and Walter Slominee furnished fifty cents. Dick got this whiskey at the old man's shop. He stepped in and got it and brought it out. George Dick went in and got this whiskey and brought it out and give it to me.

Be it further remembered that thereupon the said witness upon cross-examination by Mr. Fogg, counsel for the defendant, further testified as follows:

"George Dick got this whiskey at Culdesac, the village of Culdesac, Nez Perces County. He gave me this whiskey, right there within five steps of the place, right in the village of Culdesac. At that time I had an allotment and trust patent. George Dick is a Umatilla Indian. He has an allotment of land in severalty. Al- this occurred right there near the door where he bought the whiskey. All these transactions were within the town of Culdesac."

Thereupon the said witness was excused.

Be it further remembered that thereupon F. G. MATTOON was called, sworn, and examined as a witness in behalf of the prosecution, and upon direct examination by the United States Attorney testified as follows:

"I am superintendent and acting agent of the Nez Perce Indians, and was such in the month of March last. As such agent I took this bottle away from Te-We-Talkt. This bottle contains about one quart of whiskey. The village of Culdesac is in Nez Perces County, State of Idaho."

Be it further remembered that thereupon, on cross-examination by Mr. Fogg, counsel for the defendant, the said witness further testified:

"Te-We-Talkt, Watch-le-Loome, Johnnie Yo-Gay-Nil are all Indians that have taken their allotments of land in severalty and had trust patents from the Government therefor at the time I speak of. The village of Culdesac is a village organized under the laws of the State of Idaho as a municipal corporation."

Be it further remembered that thereupon the following question was asked the said witness upon cross-examination by Mr. Fogg, of counsel for the said defendant:

"Is any portion of the territory included within the corporate limits of the village of Culdesac under your supervision as Indian Superintendent?"

Which question was objected to by the United States Attorney as incompetent, irrelevant and immaterial, and calling for a question of law. Which objection was then and there sustained by the court, to which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Be it further remembered that thereupon the said witness, upon further cross-examination, testified as follows:

"I do not know whether or not there are any Indians within the corporate limits of the village of Culdesac. There are about sixteen hundred Indians upon the reservation at the present time. Practically all the Indians own lands in severalty."

Be it further remembered that thereupon the said witness
15 was asked the following question upon cross-examination by Mr. Fogg, of counsel for the defendant:

"As a matter of fact, Mr. Mattoon, do not your duties at the present time as Indian Agent consist of representing the Government in reference to the land and property of the Indians, and some other duties in referrence to Indian Schools?"

Which question was objected to by the United States attorney upon the ground that the law defines the duties of the superintendent, and that this is a question for legal decision, which objection was sustained by the court, and the witness not permitted to answer the same. To which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Be it further remembered that thereupon the said witness, upon further cross-examination, testified as follows:

"I do not know of any reservation or any part of the reservation used for Government purposes or for Indian purposes within the boundaries of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

Whereupon said witness was excused.

Be it further remembered that thereupon WATCH-LE-AMNEE, a witness duly sworn and examined in behalf of the United States, testified as follows:

"The defendant, George Dick, purchased whiskey at Culdesac about the 13th day of March last, five bottles, and gave the whiskey to Te-We-Talkt and other Indians at Culdesac. The defendant had nothing to do with the whiskey after leaving Culdesac."

Whereupon said witness was excused.

Be it further remembered that JOHNNIE YO-GAY-NIL, a witness produced, sworn, and examined on behalf of the United States, testified as follows:

"I saw George Dick give this bottle of whiskey to Te-We-Talkt at Culdesac on the 13th of March. Nothing happened in relation to this whiskey outside of the village of Culdesac."

Whereupon said witness was excused.

Be is further remembered that thereupon EDWARD RABOIN, a witness produced, sworn, and examined in behalf of the United States, testified as follows:

"The defendant, George Dick, at the preliminary examination before Commissioner O'Neill at Lewiston, admitted and testified that he bought liquor at Culdesac at the time charged in the indictment, and that he and three other Indians drank up two bottles of liquor."

Be it further remembered that thereupon the bottle testified to by the witness was offered and received in evidence, together with the contents, as U. S. Exhibit No. 1.

Witness excused.

Be it further remembered that thereupon the defendant, GEORGE DICK, was called as a witness in his own behalf, — upon direct examination by Mr. Fogg, testified as follows:

"I am a Umatilla Indian. I have an allotment and a trust
16 patent therefor on the Umatilla Reservation at and before the time that the witness testified that I was at Culdesac. Had my trust patent for about three years."

Thereupon said witness was excused.

Be it further remembered that at the close of the testimony and proof in the said cause, and before the said c[illegible]se was submitted to the jury, the defendant, by his said attorneys, in writing, as required by the rules of said court, duly presented to said court specific requests for instruction, numbered 1 to 3, inclusive, which said requests for instructions to the jury are as follows:

"In the District Court of the United States within and for the District of Idaho, Northern Division, May Term, 1905.

UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Request for Instructions.

"The defendant requests the court to give severally and respectively the following instructions to the jury:

1.

(See instructions in judgment roll.)

That thereupon the court refused to give any or either of said instructions so requested by the defendant, and thereupon instructed and charged the jury as follows:

"GENTLEMEN: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him within the limits of what is known as Nez Perce Indian Reservation, then you are to find him guilty of this charge. The charge, of course, is for introducing liquor into the reservation, but I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. I instruct you as a matter of fact, that Culdesac is within the limits of the reservation."

Be it further remembered that immediately after the giving of the said instructions and charge to the jury by the court, and immediately after the denying by the court of the defendant's requests to give either or any of the instructions so presented and requested in writing by the defendant, and in the presence of the jury and before the jury had retired to consider their verdict, the defendant excepted to the refusal of the court to give the instructions so requested, and the instructions given the jury by the court upon its own motion, specifically, as follows:

"The defendant excepts to the refusal of the court to grant the request for instructions numbered 1, 2, and 3, respectively, and specifically excepts to the refusal to grant each of said instructions. The defendant further excepts to the instructions given to the jury upon the court's own motion, particularly to that part of the instructions wherein the court instructs the jury that the village of Culdesac is a part of the Indian reservation, and substantially instructs the jury that the village of Culdesac is Indian country or Indian allotment within the meaning of the statute under which the indictment is laid. And further specifically objects to that portion of the instruction given by the court upon its own motion wherein
17 the court instructs the jury that 'if they find from the evidence that there was liquor found in the possession of the defendant, that that is conclusive presumption that he is "guilty" of introducing liquor upon the reservation.' Denying to the defendant a presumption of innocence and denying to the defendant the right to prove his innocence of the charge against him."

All of which exceptions were by the court at the time allowed and directed to be made a part of the record.

Be it further remembered that thereupon the jury retired by direction of the court to consider their verdict, and after being absent for a time returned in court on the said 15th day of May, 1905, their verdict being as follows:

"In the District Court of the United States in and for the District of Idaho. The United States of America *vs.* George Dick. Verdict: We, the jury sworn and empanelled in the above-entitled cause, find the defendant guilty as charged in said indictment.

"C. A. HAGAN, *Foreman.*

"(Endorsed:) Filed May 15, 1905. A. L. Richardson, clerk."

Be it further remembered that thereupon, in open court and before the jury was discharged, the defendant, by his counsel, excepted to the said verdict and moved that the same be set aside, which exception was at the time allowed by the court and made a part of the record herein.

Be it further remembered that thereafter, and on the 16th day of May, 1905, and before judgment was passed by the court upon the said verdict of guilty and conviction of the said offense so charged in said indictment, the said defendant, by his said counsel, made and filed in said court a motion in arrest of judgment, which said motion is as follows:

"In the District Court of the United States in and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Motion in Arrest of Judgment.

"Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction by the verdict of the jury, under his plea of "Not guilty" herein, for the reasons:

"1st. That the indictment herein does not state facts sufficient to constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any law of the United States.

"2nd. That this court has no jurisdiction over the person of this defendant, nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States, but to the contrary it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho, and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States has no power to pass a law providing for police regulation over the
18 matters and things alleged in said indictment within the territory of the State of Idaho, or over the place where said offense is said to have been committed.

"Wherefore the defendant prays that judgment upon the said verdict and conviction be arrested and that he be discharged.

"Dated this 16th day of May, A. D. 1905.

"F. E. FOGG AND
"GEO. W. TANNAHILL,
"Attorneys for Defendant.

"(Endorsed:) Filed May 16th, 1905. A. L. Richardson, clerk."

Be it further remembered that on the day last aforesaid the said motion was duly submitted to the court for its decision thereon, and the court, after hearing argument thereon and being fully advised, overruled and denied said motion in arrest of judgment, to which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was allowed by the court, which ruling and decision of the court the defendant assigns as error.

Be it further remembered that thereafter, and on the 16th day of May, A. D. 1905, the court rendered its judgment and sentence upon said verdict so convicting the said defendant of the said offense set forth in the indictment herein, by which it was ordered and adjudged

that the said defendant be imprisoned in the Idaho State penitentiary at Boise, State of Idaho, for the term of one year and ten days, which judgment is filed in this court in this action and of record herein.

Be it further remembered that thereafter, and on the 24th day of May, and within ten days after the verdict herein, the said defendant, by his attorneys, made and filed in this action and served upon the United States district attorney a notice of intention to move for a new trial, which said notice is as follows:

"In the District Court of the United States in and for the District of Idaho, Northern Division, May Term, 1905.

"THE UNITED STATES OF AMERICA, Plaintiff,
vs.
"GEORGE DICK, Defendant.

"*Notice of Intention to Move for a New Trial.*

"To the plaintiff above named and to N. M. Ruick, district attorney, and by virtue thereof, attorney for plaintiff, and to each of you:

"Take notice that the defendant above named intends to and will move the above-entitled court to vacate and set aside the verdict rendered in the above-entitled cause, on the 15th day of May, A. D. 1905, and to grant a new trial of said cause upon the following grounds, to wit:

"1. Insufficiency of the evidence to justify the verdict and that the same is against law.

"2. Errors of law occurring at the trial and excepted to by the defendant.

"3. Errors of law occurring in the instructions of the court, wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

"4. Errors of law in overruling the defendant's demurrer to the indictment herein, and overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

19 "Said motion will be made and based upon a statement of the case to be hereafter prepared and served, settled and filed, upon the indictment heretofore filed herein, and upon the defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

"F. E. FOGG AND
"GEO. W. TANNAHILL,
"*Attorneys for Defendant, Residing at Lewiston, Idaho.*

"(Endorsed:) Filed May 24th, 1905. A. L. Richardson, clerk."

Be it further remembered that thereafter, and on the said 24th day of May, 1905, the said defendant, by his said attorneys, made

and filed in this court and served upon the United States attorney his motion for a new trial, which said motion is as follows:

"In the District Court of the United States in and for the District of Idaho, Northern Division, May Term, 1905.

"THE UNITED STATES OF AMERICA, Plaintiff,
vs.
"GEORGE DICK, Defendant.

"***Motion for a New Trial.***

"Comes now the defendant above named, pursuant to notice heretofore given, and moves the court that the verdict rendered in the above-entitled cause on May 15th, 1905, be set aside and vacated and a new trial granted therein upon the following grounds:

"1. Insufficiency of the evidence to justify the verdict and that the same is against law.

"2. Errors of law occurring at the trial and excepted to by the defendant.

"3. Errors of law occurring in the instructions of the court wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

"4. Errors of law in overruling the defendant's demurrer to the indictment herein, and in overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

"This motion will be made and based upon a statement of the case to be hereafter prepared and served, the indictment heretofore filed herein, defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

"F. E. FOGG AND
"GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) "Filed May 24th, 1905. A. L. Richardson, clerk."

Be it further remembered, that at the same term of this court at which the trial was had and judgment rendered herein, and on the 16th day of May, 1905, the court made the following order:

"In the District Court of the United States in and for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

"Order Extending Time to Settle Bill of Exceptions.

"It appearing to the court that additional time is necessary
20 for the defendant to prepare and present a bill of exceptions during the trial for settlement:

"It is therefore ordered that the defendant's time for preparing, presenting, and serving upon the district attorney a bill of exceptions thereof, upon the trial of the cause, including exceptions taken to the overruling of the demurrer and exceptions to the order of the court overruling and denying defendant's motion in arrest of judgment and all the exceptions taken upon the trial, and the admission and rejection of evidence, and to the instructions of the court, be extended for sixty days from the date of this order.

"Done in open court this 16th day of May, A. D. 1905.

"JAS. H. BEATTY,
"District Judge.

(Endorsed:) "Filed May 16th, 1905. A. L. Richardson, clerk."

Specifications of Error.

Comes now the defendant, George Dick, and assigns and specifies the following grounds of error in the proceedings herein, upon which he will rely for the hearing of the said motion for a new trial, and upon appeal from the judgment herein, or upon appeal from the order, denying his said motion for a new trial, should the same be denied, all of which said errors are based upon exceptions duly taken and allowed, as hereinbefore set forth.

I.

The court erred in overruling defendant's demurrer to the indictment herein severally upon all the grounds stated in the said demurrer.

II.

The court erred in overruling defendant's objection to the following question asked the witness Te-we-Talkt on direct examination: "You are a Nez Perce Indian living on the Nez Perce Indian Reservation?" and in permitting said witness to answer said question, and in admitting any evidence in said indictment, upon all the grounds severally stated in said objection.

III.

The court erred in sustaining the objection of the United States attorney to the following question asked the witness F. G. Mattoon, on cross-examination: "Is any portion of the territory included within the corporal limits of the village of Culdesac under your supervision as Indian superintendent?"

IV.

The court erred in sustaining the objection of the United States attorney to the following question asked the witness F. G. Mattoon, on cross-examination: "As a matter of fact, Mr. Mattoon, do not your duties at the present time as Indian agent consist in repre-
21 senting the Government in reference to the land and property of the Indians, and some other duties in reference to Indian schools?"

V.

The court erred in refusing and failing to give each of the instructions requested by the defendant, numbered 1 to 3, inclusive, respectively.

VI.

The court erred in instructing the jury as a matter of law that the village of Culdesac is a part of the Indian reservation, and in substantially instructing the jury that the village of Culdesac is Indian country, within the meaning of the statute under which the indictment was laid.

VII.

The court erred in instructing the jury as follows: "That I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it was immaterial. That it was in his possession within the limits of the Indian reservation is sufficient," said instruction denying to the defendant the presumption of innocence, and denying to the defendant the right to prove his innocence of the charge against him.

VII.

The court erred in rendering judgment upon the said verdict, because the said verdict is contrary to law and the evidence, and the defendant now specified the following particulars in which the evidence is insufficient to support the verdict, judgment, and sentence:

1. There is no evidence whatever that the defendant introduced the liquor mentioned in the indictment, or any liquor into the Indian country, or upon an Indian allotment, or upon any other place prohibited by the statute.

2. There is no evidence that the defendant introduced the said whiskey from any point without to any point within the boundaries of the Nez Perce Reservation.

3. The evidence affirmatively and without conflict shows that the

defendant did not introduce the whiskey into the Indian country, but that he bought it within a few feet of the place where he delivered it to the Indian, Te-we-Talkt, and others.

4. The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey, except within the corporate limits of the village, of Culdesac, and that he did not exercise any control over the said whiskey at any place where the Government of the United States had any jurisdiction for the purpose of police control, but to the contrary that the village of Culdesac is a place exclusively within the sovereignty of the State of Idaho for all purposes of police control.

22 IX.

The court erred in overruling and denying defendant's motion in arrest of judgment and in passing judgment and sentence upon the defendant upon all grounds severally stated in said motion.

Wherefore comes now the defendant, by his counsel, and presents this, his bill of exceptions and statement of case on motion for new trial, and statement of case on appeal to the Circuit Court of Appeals and statement of case on appeal from order denying said motion for a new trial, should the same be denied, and asks that the same be settled and certified by the honorable district judge and filed in this action as such.

F. E. FOGG AND
GEO. W. TANNAHILL,
Attorneys for Defendant.

Due service of the above and foregoing bill of exceptions and statement of case is hereby acknowledged and receipt of copy admitted this 15th day of July, 1905.

And it is further stipulated and agreed that the same may be forthwith and without further notice presented to the hon. district judge for settlement.

N. M. RUICK,
U. S. District Attorney, Boise, Idaho.

The foregoing bill of exceptions and statement of case on motion for a new trial having been prepared, served, and presented for settlement within the time granted by law, the rules of this court and the order of the hon. judge in the above-entitled court, and the same having been examined and no amendments having been proposed thereto, and the hon. United States attorney consenting thereto, the same is hereby settled, and it is hereby certified that the foregoing bill of exceptions and statement of case is true and correct.

Done at Chambers this 21st day of July, 1905.

JAS. H. BEATTY,
Judge of the U. S. District Court
for the District of Idaho.

(Endorsed:) No. 565. In the U. S. District Court for the District of Idaho, Northern Division, May term, 1905. United States

of America, plaintiff, *vs.* George Dick, defendant. Bill of exceptions and statement of case. Filed July 24th, 1905. A. L. Richardson, clerk. F. E. Fogg and Geo. W. Tannahill, attorneys for defendant, residing at Lewiston, Idaho.

23 *Opinion.*

In the District Court of the United States for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. F. SCHISSLER ET AL., Defendants.

N. M. Ruick, U. S. attorney for plaintiff.
Fogg & Tannahill, attorneys for defendants.

BEATTY, *District Judge:*

Under the demurrer to the indictment it is claimed that, notwithstanding the treaty or agreement entered into between the Government and the Nez Perce tribe of Indians on May 1, 1893 (28 Stats., 326), the statutes concerning the introduction of intoxicating liquors into the Indian reservation and the sale thereof to Indians belonging to such reservation, are not applicable to the Nez Perce Indian Reservation; and *In re* Heff, 197 U. S., 488, is relied upon to support the demurrer. That decision is based upon an act providing for the allotment of lands in severalty to the Indians on the Indian reservations, approved February 8, 1887 (24 Stats., 388). It authorized the President to procure the survey and allotment of the lands in severalty to the Indians for issuing patents therefor to them to be held in trust by the Government for twenty-five years, when final patent shall be issued to the allottees or their heirs, and that upon the completion of the allotments and the patenting of the lands to the allottees, the latter shall be subject to all the laws, civil and criminal, of the State in which they reside; and that any Indian who has taken up "his resident- separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In construing this act the Supreme Court held that, when under its provisions, an Indian allottee of Indian lands became subject to the laws of the State in which he resided, and a citizen of the United States, he, like all other citizens, ceased to be a ward of the nation, and was subject to its laws just as other citizens were, and not otherwise; and as a consequence, any one selling liquor to him was not subject to the laws concerning the sale of intoxicants to Indians.

The demurrer in this case must be considered in connection with the agreement with the Nez Perce Indians above referred to. This agreement, after referring to the said act of 1887 as authority for negotiating with the Nez Perce Indians for the cession of their surplus lands, recites that in pursuance of the provisions of said act the

agreement is made, which, after providing for the cession of the lands, the consideration and payments therefor, and other matters, provides as follows:

"Article IX. It is further agreed that the lands by this agreement ceded, those retained, and those alloted to the said Nez Perce Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, 24 whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

Such are the only provisions of this agreement possibly bearing upon the question at issue, and there are no provisions placing such Indians under the laws of the State or making them citizens of the United States. If they are subject to such laws or have such rights of citizenship, it must be by virtue of the act of 1887 and other acts. This agreement was "accepted, ratified, and confirmed" by Congress, which gives its provisions the same effect as any other law enacted by that body. While, as stated, this agreement recites that it is made in pursuance of the provisions of the other act, it does not follow that all of them are adopted. That act is referred to as the general authority for negotiating with the Indians for the cession of their lands, in pursuance of which this agreement is made. But it must result that any portions of such act which are in conflict with the agreement and later law must yield to it. It may be conceded that the conclusions of the court in the cited case concerning the citizenship of Indians and their exemption from control of United States police laws and regulations, would apply also to these Nez Perce Indians, if there is no conflict between the acts referred to. While this later agreement or act makes no provision for the citizenship of such Indians, or for their control by such laws, it may still be conceded that the provisions of the other act in such matters would apply to them if their logical results, as construed by said court, would not bring them in conflict with the later law; but this later law, on said agreement, does provide unequivocally that all the lands within this Nez Perce Reservation shall be subject for twenty-five years to all the United States laws regulating the introduction of intoxicants thereon, and that all the Indians allottees of such reservation, whether under the care of an agent or not, shall for a like period be subject to all such laws prohibiting the disposition of intoxicants to Indians. This provision is too plain for doubt, and it can not be made clearer by discussion. It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to the Nez Perce Indians, and that they are neither citizens nor subject to the laws of the State, but are still

the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants; but whether that result must follow, or whatever the result, it can not be conceded that this Article IX of the agreement is not to be enforced to its full letter and intent. It was a solemn agreement entered into between the Government and these Indians, who are far above the average Indians in intelligence, and many of whom have had long Christian training and who know the evils of the liquor traffic upon their race. It is well understood that this provision of the treaty or agreement was especially insisted upon by them for the protection of their people. For them they
25 desired and asked the intervention of the strong arm of that Government which they with unfeigned simplicity rely upon, as the child upon its father. I can not think that this provision of a solemn compact, intended to shelter from debauch and destruction a subjected and dependent people, will be so emasculated by judicial construction as to turn loose upon them a vampire class, totally reckless of the Indians' welfare of law and of society. Such a result can not be made to appear to the untutored savage as consistent with our contract with them, or with honor. I feel no hesitation in holding that this agreement with the Indians must be enforced, and that this conclusion is not in conflict with the ruling cited by the Supreme Court, in which was not involved any similar statute.

The laws applicable to intoxicants in the Nez Perce Reservation are still valid, and will be enforced by the court as they have been, until it is overruled by some controlling court. The demurrer is overruled.

NOTE.—This ruling and opinion shall be considered as made in the other like cases wherein a similar demurrer was overruled.

Dated May 26th, 1905.

(Endorsed:) No. 565. U. S. District Court, Northern Division, District of Idaho. The United States *vs.* H. F. Schissler *et al.* Opinion on demurrer. Filed Aug. 1st, 1905. A. L. Richardson, clerk.

Order Denying Motion for a New Trial.

In the United States District Court for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Order Denying Motion for New Trial.

This cause came on to be heard the 14th day of August, A. D. 1905, pursuant to notice heretofore given, upon the defendant's motion for a new trial herein; Geo. W. Tannahill and F. E. Fogg, esqrs., appearing in support of said motion and N. M. Ruick, United

States district attorney for the Northern Division, District of Idaho, appearing in opposition thereto.

After hearing the argument of the respective counsel and having duly considered the same, being fully advised in the premises the court orders that said motion be and the same hereby is overruled and denied.

Now, therefore, by reason of the law and the premises aforesaid it is ordered that said motion for a new trial be, and the same hereby is, overruled and denied, to which the defendant excepted, and exception is hereby settled and allowed.

Done at chambers this 14th day of August, A. D. 1905.

JAS. H. BEATTY,
United States District Judge for the Northern Division, District of Idaho.

(Endorsed:) No. 565. In the United States District Court, District of Idaho, Northern Division. United States of America, plaintiff, *vs.* George Dick, defendant. Order denying motion for a new trial. Filed Aug. 15, 1905. A. L. Richardson, clerk.

26 In the District Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Assignment of Error.

Comes now the defendant, George Dick, and says that in the records and proceedings in the above entitled cause there is manifest error, in this, to-wit:

1.

That the Court erred in its judgment herein, and that said judgment is without jurisdiction and void.

2.

That the Court erred in overruling defendant's demurrer to the indictment herein, severally upon all the grounds stated in said demurrer.

3.

The Court erred in overruling defendant's objection to the introduction of any evidence in the case, and in admitting any evidence upon the trial under said indictment, upon all the grounds severally stated in defendant's objection, and made a part of the bill of exceptions herein.

4.

The Court erred in sustaining the objection of the United States Attorney to the following question asked the witness, F. G. Mattoon,

upon cross examination: "Is any portion of the territory included within the corporal limits of the Village of Culdesac under your supervision as Indian superintendent?"

5.

The Court erred in refusing and failing to give each of the instructions requested by the defendant, numbered 1 to 3 inclusive, respectively, upon all the grounds stated in defendant's exception thereto.

27

6.

The Court erred in instructing the jury as a matter of law that the village of Culdesac is a part of the Indian reservation and in substantially instructing the jury that the village of Culdesac is Indian country, within the meaning of the statute under which the indictment was laid.

7.

The Court erred in instructing the jury as follows: "That I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it was immaterial. That it was in his possession within the limits of the Indian reservation is sufficient," said instruction denying to the defendant the presumption of innocence, and denying to the defendant the right to prove his innocence of the charge against him.

8.

The Court erred in rendering judgment upon the verdict, because the said verdict is contrary to law and the evidence, and the defendant now specifies the following particulars in which the evidence is insufficient to support the verdict, judgment and sentence:

1. There is no evidence whatever that the defendant introduced the liquor mentioned in the indictment, or any liquor into the Indian country, or upon an Indian allotment, or upon any other place prohibited by the statute.

2. There is no evidence that the defendant introduced the said whiskey from any point without to any point within the boundaries of the Nez Perce Reservation.

3. The evidence affirmatively and without conflict shows that the defendant did not introduce the whiskey into the Indian country, but that he bought it within a few feet of the place where he delivered it to the Indian, Te-we-Talkt, and others.

28 4. The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey, except within the corporate limits of the village of Culdesac, and that he did not exercise any control over the said whickey at any place where the Government of the United States had any jurisdiction for the purpose of police control, but to the contrary that the village of Culdesac is a place exclusively within the sovereignty of the State of Idaho for all purposes of police control.

9.

The Court erred in overruling and denying defendant's motion in arrest of judgment and in passing judgment and sentence upon the defendant upon all grounds severally stated in said motion.

10.

The Court erred in overruling defendant's motion for a new trial.

11.

The defendant further says: That each of the foregoing decisions and rulings of the court hereinbefore specified and assigned as error are upon questions involving the jurisdiction of the said court, and the con-truction and application of the constitution of the United States, and the constitutionality of the laws of the United States, and that the Court erred in finding and deciding in its ruling upon the defendant's demurrer to the indictment herein, the act of August 15th, 1894, 28 Stat. L. 326, ratifying the agreement of May 1, 1893 with the Nez Perces to be constitutional and valid in as far as it provided that the lands ceded by said agreement shall be subject for the period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country; and, further, in finding and deciding that the act
29 of February 8, 1887, 24 Statute- 388, in as far as inconsistent with said act of August 15, 1894, is not applicable to the Nez Perce Indians, and that said Indians are neither citizens nor subject to the laws of this state, but are still wards of the nation, in as far as concerns the laws regulating the sale of intoxicants; and in finding and deciding that the statute of the United States prohibiting the introduction of liquor into the Indian country under which the defendant was indicted, was applicable to the Nez Perce Reservation. And defendant says that the jurisdiction of said court over the defendant and the subject matter of said action, as well as the construction and application of the constitution of the United States, and of the constitutionality of the said law and statute, and validity and construction of the said treaty with the said Nez Perce Indians, was so put in issue and specifically decided by the court upon the ruling to the demurrer to the indictment, and upon the defendant's objection to the introduction of evidence in the case, and by the defendant's request for instruction and his exceptions to the instructions given by the Court, and upon his motion in arrest of judgment, and by his bill of exceptions and specifications of error therein, and that all of the proceedings of said court were without jurisdiction, and that the verdict and judgment of said court are void.

Wherefore, said George Dick, defendant in said action and plaintiff in error, prays that the said judgment of the said United States District Court for the District of Idaho be reversed and set aside.

FRANK E. FOGG,
Attorney for said Defendant and Plaintiff in Error.

(Endorsed:) In the District Court of the United States for the District of Idaho, Northern Division. The United States of America *v.* George Dick. Assignment of error. Filed June 15th, 1906. A. L. Richardson, Clerk.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The United States, plaintiff, and George Dick, defendant, a manifest error hath happened, to the great damage of the said George Dick, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of May, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of..
the United States.

[Endorsed:] The United States *vs.* George Dick Writ of Error Filed May 14, 1906. A. L. Richardson Clerk, U. S. Dist. Court.

31 UNITED STATES OF AMERICA, *ss:*

To The United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Idaho wherein George Dick is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error

mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this seventh day of May, in the year of our Lord one thousand nine hundred and six.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] The United States *vs.* George Dick Citation Filed May 15, 1906 A. L. Richardson Clerk U. S. District Court.

On this 15th day of May, in the year of our Lord one thousand nine hundred and six, personally appeared Frank E. Fogg before me, the subscriber, and makes oath that he delivered a true copy of the within citation to N. M. Ruick United States Attorney for the District of Idaho, at Moscow within said District on this 15th day of May 1906.

FRANK E. FOGG.

Sworn to and subscribed the 15 day of May, A. D. 1906.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON,
Clerk U. S. Dist. Court.

32 In the District Court of the United States in and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Certificate of Clerk to Transcript.

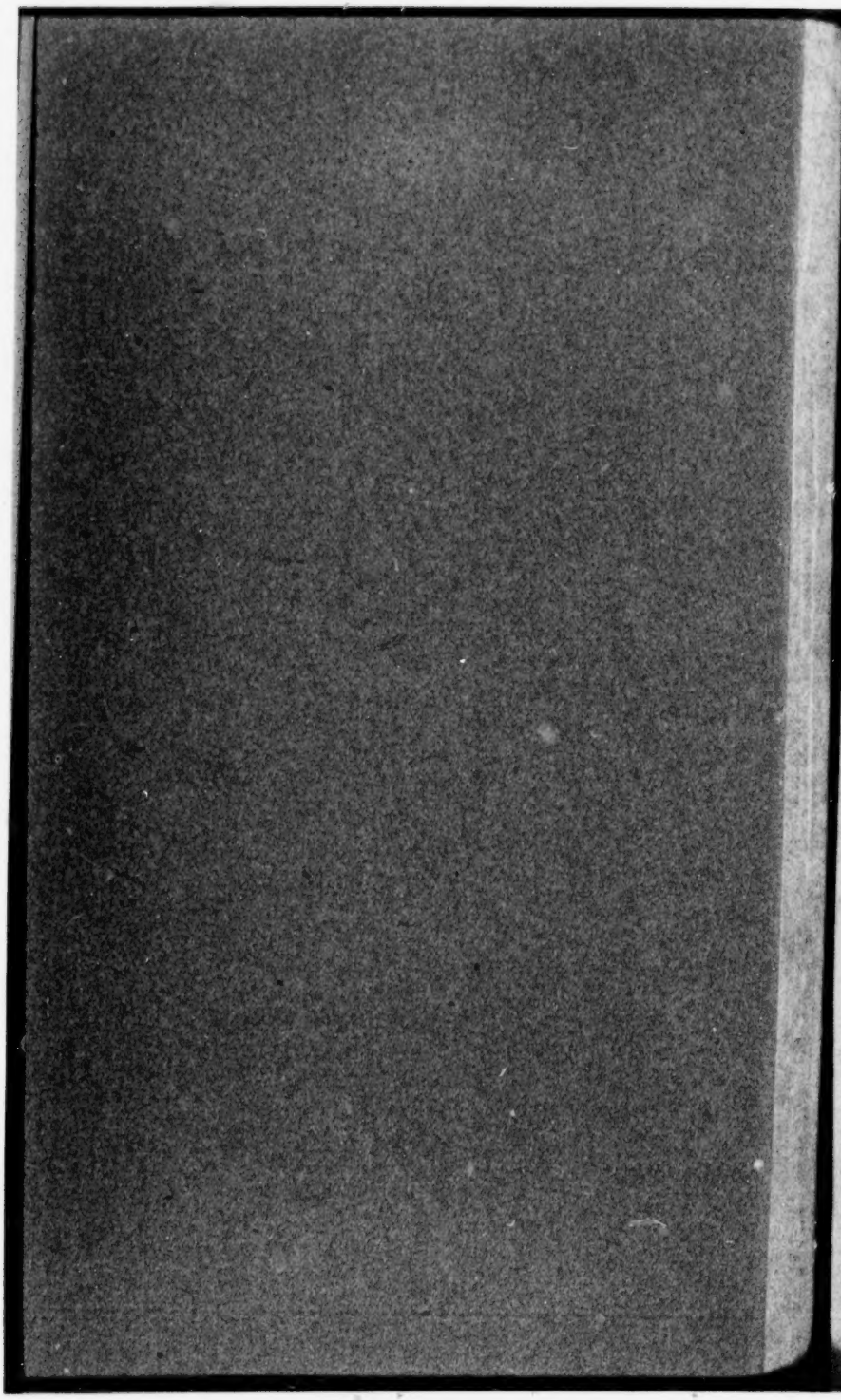
I, A. L. Richardson, Clerk of the United States District Court within and for the District of Idaho, do hereby certify *that* the foregoing transcript of pages, numbered from 1 to 32, inclusive, to be a true copy of the record and of the assignment of error, and of all the proceedings had in the above entitled matter in the said District Court of the United States, within and for the district of Idaho, including the opinion filed, as the same remain of record in my office, and that the same together constitute the transcript upon return to the writ of error to the Supreme Court of the United States, in the above entitled action.

Attest my hand and the seal of the said United States District Court, within and for the District of Idaho, at Boise, this 29th day of June, 1906.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON, *Clerk.*

Endorsed on cover: File No. 20,303. Idaho D. C. U. S. Term No. 338. George Dick, plaintiff in error, *vs.* The United States. File July 6th, 1906. File No. 20,303.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 62

GEORGE DICK,

Plaintiff in Error

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

This case is upon writ of error to the District Court of the United States for the District of Idaho.

George Dick the plaintiff in error was convicted and sentenced to a term in the penitentiary and to the payment of a fine and costs upon a charge of introducing liquor into the Indian country (Transcript, page 8.)

Writ of error was duly allowed and citation duly served. (Transcript, pages 31 and 32.)

The plaintiff specifies and assigns as error the decision and ruling of the court upon questions involving the jurisdiction of the said court and the construction and application of the

constitution of the United States and the constitutionality of the laws of the United States. (Transcript page 30.)

The plaintiff in error was charged in the indictment with violation of section 2139 R. S., as amended by 29 Stat. L. 506 (Transcript page 1), which amended statute, among other things, provides as follows:

"Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors, * * of any kind whatsoever, into the Indian country, which terms shall include any allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee, without the consent of the United States, shall be punished, etc."

29 Stat. L. 506.

The indictment, conviction and commitment of the plaintiff in error, Dick, are founded upon the charge of introducing liquor in the village of Culdesac, an incorporated village within the state of Idaho.

The testimony of United States Witness Te-We-Talkt is in part as follows:

"George Dick got this whiskey at Culdesac, the village of Culdesac, Nez Perce county. He gave me this whiskey right there within five steps of the place, right in the village of Culdesac. All this occurred right there near the door where he bought the whiskey. All these transactions were within the town of Culdesac." (Transcript, page 15.)

United States witness F. G. Mattoon (Transcript, page 15), testified as follows:

"The village of Culdesac is in Nez Perce county, state of Idaho. The village of Culdesac is a village organized under the laws of the state of Idaho as a municipal corporation.

The village of Culdesac is not within any reservation used for any government purpose of for Indian purposes nor upon any Indian allottment."

Testimony of United States witness F. G. Matoon (Transcript, page 16.) is as follows:

"I do not know of any reservation or any part of a reservation used for government purposes or for Indian purposes within the boundaries of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

There is no dispute about the fact, indeed, there could be none, as the District Court of Idaho, and this Court, we assume, takes judicial knowledge of the location of an incorporated town and that under the laws of the United States lands reserved for the use and occupation of Indians, or for any government purpose, could not be included within a patent of the United States to the inhabitants of a town under the townsite laws.

The Court of Appeals in a decision rendered in a habeas corpus proceeding involving the identical facts shown by the transcript herein says:

> "The Village of Culdesac is located upon land ceded by the Indians to the United States, about six or seven miles from the exterior boundary of the Indian School Reservation, and no reservation or any part of a reservation used for government purposes, or for Indian purposes is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Culdesac is located had passed from the United States by patent under the townsite laws to the Probate Judge of Nez Perce country, Idaho, in trust for the inhabitants of the village."
>
> 141 Fed 7.

The defendant Dick demurred to the indictment and therein specifically challenged the jurisdiction of the court upon the ground, among others, that the Indian title to the land embraced within the former Nez Perce Indian Reservation had been relinquished by allotment of the land in severalty to the Indians and the purchase of the remaining land by the government, and that said land had been opened to settlement and the government title had passed to the citizens of Idaho under the homestead and townsite laws—and that the lands em-

braced in said reservation were not at the time of the alleged offense "Indian country."

The court rendered a decision overruling defendant's demurrer deciding among other things, as follows (Transcript page 26).

"It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1st, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to a Nez Perce Indian, and that they are neither citizens nor subject to the laws of the state but are still the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants."

The defendant upon the offer of proof under the indictment again challenged the jurisdiction of the Court and urged the unconstitutionality of the law under which the indictment was laid. (Transcript, page 14.)

The jurisdiction of the Court as well as the constitutionality and the construction of the statutes is again brought in question by the defendant upon his motion in arrest of judgment. (Transcript, page 19.)

The defendant in the District Court, in a statement of the case which was certified by the Hon. District Judge specifies, among others, the following ground of error: (Transcript, page 24.)

"The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey except within the corporate limits of the village of Culdesac and that he did not exercise any control over the said whiskey at any place where the government of the United States had any jurisdiction for the purpose of police control but to the contrary, that the village of Culdesac is a place exclusively within the sovereignty of the state of Idaho for all purposes of police control."

Assignment of Errors.

The position and contention of the plaintiff in error upon the appeal is summarized in paragraph 11 of his assignments of error herein as follows: (Transcript page 30.)

"That each of the foregoing decisions and rulings of the court hereinbefore specified and assigned as error are upon questions involving the jurisdiction of the said Court, and the construction and application of the constitution of the United States, and the constitutionality of the laws of the United States and that the Court erred in finding and deciding in its ruling upon the defendant's demurrer to the indictment herein, the act of August 15th, 1894, 28 Stat. L. 326, ratifying the agrement of May 1st, 1893, with the Nez Perces to be constitutional and valid in so far as it provided that the lands ceded by said agreement shall be subject for the period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants in to the Indian country; and further in finding and deciding that the act of February 8th, 1887, 24 Stat. L. 388, in as far as inconsistent with said act of August 15th, 1894, is not applicable to the Nez Perce Indians, and that said Indians are neither citizens nor subject to the laws of the state, but are still wards of the nation in as far as concerns the laws regulating the sale of intoxicants: and in finding and deciding that the statute of the United States prohibiting the introduction of liquor into the Indian country, under which the defendant was indicted was applicable to the Nez Perce Reservation. And defendant further says that the jurisdiction of said court over the defendant and the subject matter of said action, as well as the construction and application of the constitution of the United States, and of the constitutionality of the said law and statute, and validity and construction of the said treaty with the said Nez Perce Indians, was so put in issue and specifically decided by the Court upon the ruling to the demurrer to the indictment, and upon the defendant's objection to the introduction of evidence in the case, and by the defendant's request for the instructions and his exceptionsto the instructions given by the Court,and upon his motion in arrest of judgment and by his bill of exceptions and specifications of error therein, and that all of the proceedings of said Court were without jurisdiction, and that the verdict and judgment of the said court are void."

ARGUMENT.

The record herein presents the clean-cut issue: Has the United States jurisdiction for the purpose of local police control over territory within a state owned in fee by white citizens of such state, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever.

In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state and outside the jurisdiction of the United States. With respect to such a case this Court has said:

> "It will not be doubted that an act of congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state wouldbe an invasion of the state's jurisdiction and could not be sustatined, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."
>
> In re Heff 197 U. S. 505.

I believe that the broad constitutional question decided in re Heff, supra—that there can be in police matters *no such thing as a divided sovereignty*, is absolutely controlling in the case at bar, and that the plaintiff in error's case might well be submitted upon the simple statement of the foregoing proposition.

But in the present case there are even stronger reasons than were presented in the matter of Heff, supra, for denying to the United States jurisdiction in the premises.

In the matter of Heff, this Court based its decision upon the unconstitutionality of the act of January 30, 1897, 29 State. L. 506, in as far as that act attempted to control the sale of liquors to an Indian, to whom an allotment of land has been made, and who, by the act of receiving such allotment, had become, under the laws of the United States a citizen of the United States and of the state wherein he resides. While in the case at bar, I contend that even if the statute could be

held constitutional the acts charged do not constitute an offence under the statute.

The statute provides, among other things, as follows:

> Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors,* of any kind whatsoever, into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished, etc.
> 29 Stat. L. 506.

This statute is subsequent to the act of congress ratifying the agreement with the Nez Perces, by which it was attempted to retain jurisdiction over the lands ceded by the Nez Perce Indians for the purpose of regulating the sale of intoxicating liquors, and amends the then existing laws, in so far as inconsistent in its provision. The fact that Congress provided that the term "Indian Country" should include any Indian allotment while the title to the same should be held in trust by the government would indicate that the term as used in that act, was not deemed sufficiently broad to include land with which the government had parted with title, even though it be held in trust for the Indian, and, *a fortiori* must the term "Indian country" have been used in a sense excluding entirely lands that the government had patended to white citizens without any restrictions whatsoever. Therefore, it seems to me that by the very terms of the act under which the plaintiff in error was charged, even if the same could be held constitutional, that the lands included within the Village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian Country," as contained in said act.

There can be no doubt that the effect of the act of January 30th, 1897, 29 Stat. L. 506, is to amend the laws existing at the time of the agreement of May 1, 1893, with the Nez Perces, in relation to the prohibition of the introduction of intoxicating liquors into the Indian country, by provding a definition of the term Indian country, which by specifically including any Indian allotment while the title to the same shall be held in trust by the government, thereby excluded the idea

that the term "Indian Country" includes lands of which the title had passed by government patent to citizens of the state without resriction. This act is of general application, and the Nez Perce Indian reservation is in no manner excepted from its provisions. It cannot be successfully maintained that Congress by the act of ratifying the agreement with the Nez Perces, could place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto.

Lone Wolf v. Hitchcock, 187 U. S. 553.

A brief consideration of the principles upon which this Court decided, in the matter of Heff, that the act of 1897, 29 Stat. L. 506, was invalid, in as far as it attempted to regulate the sale of liquor to an Indian who had become a citizen, I think will lead to the conclusion that it is equally invalid in as far as it is attemtped to prohibit the introduction of liquor for the purpose of commerce with citizens at any place where the government has parted with its title to the citizens of the state without any restriction.

This Court, in a line of decisions reaching from a period of nearly a century, has based the power of the Federal government to legislate in reference to the sale of liquor to Indians solely upon the provision of section 8, article 1, of the Constitution, granting to Congress power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

For the purpose of giving effect to this provision of the Constitution, Indian tribes were considered as standing in a similar position to foreign nations, and members of Indian tribes were treated in analogy to citizens of a foreign country.

As long as the tribal relations were maintained, this Court has repatedly held that Congress, under this provision of the Constitution, had power not only to prohibit the sale of liquor within the Indian country, but to members of the tribes outside of the Indian country, and in United States v. Forty three

Gallons Whisky, 93 U. S., 198, held that congress had power to exclude spirituous liquors not only from Indian countries, but from that which has ceased to be so by reason of its cession to the United States, but being within territory in proximity to that where the Indian lived. This case does not sustain the position that the United States has jurisdiction in the case at bar. It will be noted, however, that the authority of Congress in that case is predicated entirely upon the clause i n the constitution relating to the regulating of commerce with Indian *tribes*. The Court in that case, referring to United States vs. Holliday, 3 Wall, 409, which is followed, says:

> But this Court held that the power to regulate commerce *with Indian tribes* was in its nature general and not confined to any locality, that its existence carried with it the right to exercise it *whenever there was a subject to act upon*, although within the limits of the state, and that it extended to the regulations of commerce with the individual members of such *tribes*. * * * * * *

The Court then proceeds to apply these principles to the case under consideration, as follows:

> As long as the Indian remains a *distinct people with the existing tribal organizations*, recognized by the Political Department of the Government, Congress has power to say with whom and on what terms they shall deal, and what articles shall be contraband.

The Court in this case also cites Worcester v. Georgia, 6 Pet. 515, and commenting upon that case says:

> Chief Justice Marshall, in this case with force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived, and this exposition was *based on the power to make treaties and regulate commerce with the Indian tribes*, * * * * and Congress has now the exclusive and unfettered power to regulate commerce with the *Indian tribes*, a power as broad as to regulate commerce with foreign nations.

In a decision sustaining the constitutionality of the act of 1862 amending the act of June 30th, 1834, 4 Stat. U. S. 732,

prohibiting the sale of spiritous liquors to an Indian under the charge of an Indian agent, this Court said:

> The locality of the traffic can have nothing to do with the power. The right to exercise it in refernce to any *Indian tribe* or any person who is a *member of such tribe* is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitntion authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the *Indian tribes.*
>
> United States v. Holliday, 3 Wall. 407-420.

The only essential point decided in Bates v. Clarke, 95 U. S. 204, is that all the country described by the act of 1834 as Indian country, remains Indian country so long as the Indians retain their title and right to the soil, and ceases to be Indian country whenever they lose their title, in absence of any different provision by treaty or by act of Congress. And in this case the Court holds that the territory upon which the liquor was seized had ceased to be Indian country as soon as the Indians parted with title, without any further act of Congress.

And in this case the Court distinguished its decision in United States v. Forty-three Gallons Whisky, supra, as follows:

> While the Court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remains Indian Country until they remove from it. The whole opinion goes upon the hypothesis that when the Indian title is extinguished, it ceases to be Indian Country, unless some such reservation takes it out of the rule.

It will be noted that the treaty with the Red Lake and Pembina band of Chippewa Indians, ceding to the United States a portion of their land was concluded on October 2, 1863, and it was under this treaty and under the condition then existing, and under the policy then pursued by the United States in the government of Indians, that the decision in United States v. Forty-three Gallons Whisky, supra, was based.

The distinction between that case and the case at bar is ap-

parent and well defined. There was nothing in that treaty looking to the dissolution of the tribal relation of the Indians, the tribes remaining intact, and at that time the policy of the Government was to deal with the Indians by treaties, and as a people distinct from the citizenry of the nation.

By the act of March 3, 1871, 16 Stat. L. 556, it is provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.

Referring to the act of Congress above quoted, this Court has said:

> After an experience of one hundred years of treaty-making sytem of government, Congress has determined upon a new departure—to govern them by acts of Congress.
>
> United States v. Kagama, 118, U. S. 375.

And in the matter of Heff, 197 U. S., page 499, says:

> From that time on, the Indian tribes and individual members therof, had been subject to direct legislation of Congress, which for some time therafter continued the policy of locating the tribes of separate reservations, and perpeutating the communal of tribal life. * * * * Of late years, a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of separate indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States."

It is under these later conditions, and the present policy of the government, and of Congress, that we must view the statute under which the plaintiff in error was convicted—interpret and construe it in reference to the agreemnt of May 1, 1893, with the Nez Perces; test its constitutionality, and weigh the power of Congress to reserve partial sovereignty within the former Nez Perce reservation.

The very effect and purpose of this agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations;

to dissovle the tribal entity; to do away with the last remnant of inter-tribal customs, government, and police control; to remove the very machinery of government supervision and control, and renounce the guardianship of the government over the persons of the Indians; to renounce as well anything like a general guardianship over even the property of the Indian —the Indian being left free to hold property and contract for himself in reference thereto, save a restriction upon the alienation of land patented to him by the government.

In fact, the Government of the United States, by the very act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves.

Unless the sixteen hundred Indians immediately become full citizens of the state of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status an anomaly suspended in the air betwen the sovereignty of the state and the sovereignty of the nation.

Contention of the Government that there can be such a thing as qualified citizenship—that is, that it was competent for Congress to confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the state where they were located, and at the same time deny to the state the right to subject them to the same complete and inclusive police control that it may its other citizens, is untenable.

> Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of which the supreme court, in an opinion written by Mr. Justice Bradley, has said: "When a man has emerged from slavery, by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation

> when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25.
>
> In Celestine, 114 Fed. 551-553.

We are entitled to presume that the executive department of the government, before alloting the land in severalty to the Nez Perces, and thereby conferring upon them the rights and corresponding responsibilities of citizenship, had determined that the members of that tribe were sufficiently advanced in civilization to be safely intrusted with the immediate duties and grave responsibilities concomitant with such a status.

In fact, the Nez Perces are perhaps among the most enlightened and intelligent of the Indian tribes.

Even if the reverse were true, Congress was without power under the constitution to renounce the governmnt duty of police control of these people, to break up their tiibal relations, and distribute the mamong the white citizens of Idaho, clothed with all the rights of ordinary citizens and freed from the restriction of government control, and, at the same time, to deny to the state the same full control it has over its other citizens.

The Supreme Court of Kansas, in a recent case, cited with approval by this Court, in re Heff, supra, says:

> Congress, by authorizing the leasing and sale of lands by the allottees with the approval of the secretary of the interior, encouraged the white to go among the Indians and upon their lands, not with the view of benefitting the white man, but with the view of giving to the Indians better environments and developing their lands. We are not to presume that Congress would encourage the white man to go with his family among and upon the lands of the Indian for the benefit of the Indian, and not protect him, his family and his property against the depredations and lawlessness of the Indian, unrestrained other than by the laws of the tribe to which he belongs. * * * * * It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and

> he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and standards of a tribal council. An Indian upon whom has been conferred citizenship and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated.
>
> In re Now-goe-Zhuck, 76 Pacific, 877-880.

This reasoning of the Supreme Court of Kansas is peculiarly applicable to the condition of the Nez Perces existing at the time of the allotment, and since developed upon their former reservation.

The Nez Perce reseravtion consisted of over thirty townships, or something like 700,000 acres of land.

The reservation was at this time, and for many years prior thereto has been, surrounded by settled communities. The Indians for years had mingled with the white settlers. Practically all the younger Indians were versed in the English language. Probably a majority of the Indians had adopted the Christian religion, and, as a whole, the tribe was far advanced in civilization.

The topography of the reservation is peculiar. The Clearwater river traverses the reservation in a northeasterly direction for nearly seventy miles. The general elevation above sea level of the valley of the Clearwater is from six to seven hundred feet. Lying west of the Clearwater valley, at an altitude of nearly 3,000 feet above sea level, is a level plateau of prairie lands, having an area of several hundred thousand acres.

The Indians were in actual occupancy only of the river valley. Practically none of the Indians ever lived upon or occupied the high lands.

Upon the taking of allotment in severalty, the Indians selected for their homes the low lands in the valley of the Clearwater and its tributaries. It is true several hundred allotments were taken upon the high prairie lands, but with perhaps less than a score of exceptions, these lands have never been occu-

pied by Indians as homes, but have been leased to the whites. The Indian owners continued to live in the settlements along the river.

Since opening the ceded lands for settlement in November, 1895, practically all of the ceded lands have been located under the homestead and townsite laws, and a large portion thereof has since been conveyed by patent to the settlers without any restriction whatever in the patent against the use and occupation of the land for any purpose.

The white population upon the ceded lands within the former reservation today numbers little less than 10,000 people. There are several towns thereon incorporated under the laws of Idaho, among which are Nezperce, with a population of one thousand; Culdesac, Stites, Kooskia, Peck, Ilo, Mohler, Orofino, Kamiah, Gifford and a number of other towns and villages each having a population of several hundred people.

The upland plateau I have mentioned is now practically a vast grain field of several hundred thousand acres producing annually six or seven million bushels of grain.

Congress must have anticipated such results from the opening of this vast territory to settlement. It is but the repetition of many a like chapter in the history of the settlement of the fertile prairie lands of the west.

It is no longer a question of the government protecting the Indians and feeble frontier settlements of whites from the demoralization and danger of the intoxication of savages.

The motive for establishing saloons upon the reservation is not at all for the purpose of engaging in traffic with the Indians, but for the purpose of furnishing liquors desired by the white settlers for mechanical and medicinal purposes and as a beverage.

It is not a question of regulating commerce among the Indian tribes, for there are no Indians here living in tribal relations, nor even is it to any controlling degree a question of commerce with individual Indian citizens, but it is essentially and pre-eminently a question of regulation of the liquor traffic among the white citizens of the state.

The danger of any encroachment upon the system of inde-

pendent local self-government contemplated by our constitution is well illustrated by the conditions prevailing in the former Nez Perce reservation prior to the decision of in re Heff which has been considered by the state authorities as holding that the state had jurisdiction in the premises.

In every town and even in every little hamlet and cross-road throughout the reservation were men engaged in the illicit sale of intoxicating liquors. The government, from the fact that it has no organized system of local police or constabulary, has been powerless to suppress or even regulate this traffic. In many instances, the men engaged in this traffic were criminals of the worst type, and their places of business, commonly called "boot-legging joints" were the headquarters of gamblers and criminals, and breeding places of vice.

Since the state has assumed jurisdiction over this territory and brought the same within its system of high license control, the boot-legging joint has entirely disappeared, and in its place is the licensed saloon, subject to constant inspection and control by the local police officers of the state, and of the municipality wherin such saloon is located.

Thus, the Indian shares with the white citizen a better and healthier condition of civic life under state control.

I have referred to the history and conditions of the Nez Perces perhaps to an extent that might seem to go beyond the matters shown by the record herein. I am induced to do so because I deem all the matters of fact that I have stated to be matters of history, and general public knowledge within the districts of Idaho, of which the United States courts may take judicial knowledge, and because the considerations I have suggested in connection with the agreement with the Nez Perces, and the various acts of Congress in the premises, show conclusively that it must have been the intention of Congress to terminate the tribal relations with the Nez Perces, and that the effect of all this legislation has been to bring about a state of affairs entirely inconsistent with the idea that the administrative department of this government still retains any such general control over the persons of the Indians as is inconsistent with the intention of Congress to renounce entirely its guardianship over the persons of the Indians.

I could not better illustrate the reverse conditions upon which the earlier decisions are based sustaining the juridiction of the United States over Indians, than by quoting the views of this court expressed in an opinion by Mr. Justice Miller, in a decision sustaining a conviction in the United States Court of an Indian for the crime of murder, wherein the tribal status of the Indian and consequent non-allegiance to the state are clearly made the controlloing consideration.

> Its effect (the status under consideration) is confined to the *acts of an Indian of some tribe,* of a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of congress.
>
> These *Indian Tribes* are the wards of the Nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. *They owe no allegiance to the States and receive from them no protection.*. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by the Court wherever the question has arisen."

United States v. Kagama, 118 U. S. 375-385.

The provisions of Section 19, Article 21 of the Constitution of the State of Idaho, providing, in effect, that the jurisdiction of the United States over the lands owned by Indians and Indian tribes should continue only until the Indian title thereto should be extinguished, as expressly ratified by act of congress of June 3, 1890, admitting Idaho as a state, amounting to a compact between the United States and the state of Idaho granting the state exclusive jurisdiction over such Indian reservations for all purposes of police control, *as soon as the title should be extinguished;* and inasmuch as by the subsequent agreement of May 1, 1893, with the Nez Perces, as ratified by act of congress, August 15,

1904, 28 Stats. 332, the Indian title was extinguished, congress was without authority to reserve jurisdiction over the land ceded after the *Indian title had been extinguished*, especially after the title thereto had, as in the case at bar, passed from the United States to citizens of Idaho under the townsite laws, without any restrictions in the government patent.

It will be particularly noticed that there is nothing in this compact between the United States and the state of Idaho that contemplates any such thing as a divided sovereignty. The jurisdiction over lands embraced in the Indian Reservations or belonging to Indian tribes shall remain under the absolute jurisdiction and control of congress *until the Indian title is extinguished*.

There can be no question but that the United States could have retained its absolute jurisdiction for any length of time over these lands so reserved, and that it was entirely optional with the government acting thru its congress to determine when it would release its control over the Indian reservations by the extinguishment of the Indian title. But it was not within the power of congress to turn over to the state of Idaho a partial and divided jurisdiction and sovereignty over these lands. It could not ask or require the state of Idaho to assume the respponsibility of a divided jurisdiction and partial police control. It had authority only to retain absolute jurisdiction and control or by the extinguishment of the Indian title to grant absolute jurisdiction and control to the state of Idaho.

It is conclusively shown by the record, and by facts of which the court will take judicial notice, that the Indian title has been extinguished to the lands included in the former within the said village of Culdesac, and that the same has been granted by the United States to citizens of the state of Idaho without any restrictions.

Upon this point, this Court, in a case involving the construction of similar provisions in the Constitution of the state of Montana, and in the act of congress admitting that state to the Union, has said:

> In February, 1887, by a general law, congress provided for the allotment of lands in severalty to Indians

on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes. 24 Stat. 388. The act in question contemplated the gradual extinction of Indian Reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in seciton 6 'that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' But the act at the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be alloted. * * From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise, where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the *power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands* once in an Indian Reservation, but which *had become extinct by allottment in severalty*, and in which contingency the *Indians themselves would have passed under the authority and control of the state.*

Draper v. United States, 164, U. S. 240.

And in discussing the act of congress admitting Colorado into the Union as a state, this Court has said:

The act of March 3, 1875, necessarily repeals the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith. Case of the Cherokee Tobacco, 11, Wall. 616. Whenever, upon the admission of a state into the Union, congress has intended to except out of it an Indian Reservation, or the sole and exclusive jurisdiction over the reservation,

> it has done so by express words. * * * * * * * * *
> The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indian in their improvements, or the regulation by congress of the alienation and descent of property and the government and internal police of the Indians.
>
> United States v. McBratney, 104, U. S. 621-624.

Applying the principles declared by this court in Draper vs. United States, and in United States vs. McBartney, supra, to the question of jurisdiction of the United States over lands ceded by the Nez Perces, the jurisdiction of the United States would be limited to the protection of the lands allotted from alienation or encumbrance, and incidentally, perhaps, the protection of the improvements upon said lands, for, as suggested in Draper vs. United States, the Indians themselves, by act of taking allotments in severalty under the provisions of the law of 1887, have passed under the authority and control of the state, and are subject to its laws, both civil and criminal, and therefore, crimes committed by or against Indians are to be punished the same as crimes committed by or against the white citizens, and all questions of the government and internal police of the Indians become inapplicable, as such functions cannot properly be exercised by the United States over citizens of the state in their intercourse and commerce with each other within the state.

The United States v. Rickert, 188, U. S. 432, is clearly distinguished by this court in re Heff, in as far as it had relation to the issues in the case at bar. What is said therein in reference to the Indians being wards of the government, when read in the light of the entire decision, only goes to the extent of a special guardianship for the purpose of protecting the lands allotted and the personal property given the Indians by the government to aid them in adopting the ways of civilization. There is nothing in that decision that suggests that the government retains any control over the person of the Indians after they become citizens. It is with this latter question, and not with the property rights of Indians, that the case at bar has to do.. In this case the introduction of the liquor was not upon an Indian allottment, but upon lands admitted to be owned in fee by white citizens of Idaho.

The theory upon which the plaintiff in error was tried and convicted is clearly shown by the opinion of the Honorable District Judge overruling the demurrer to the jurisdiction of the Court, and in the instructions to the jury.

The opinion in no wise suggests that a clear issue of law is not presented challenging the jurisdiction of the Court, and upholds the indictment and retains jurisdiction solely upon the grounds that the *entire* former Nez Perce Reservation is still Indian country, and that *all* the Nez Perce Indians are still wards of the government and not citizens, notwithstanding, it is conceded that they have received allottments in severalty. (Transcript, page 26.)

> "It leaves *the entire Reservation and all the Indian allottees* thereof for 25 years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these *provisions of the act of* 1887 *are not applicable to the Nez Perce Indians and that they are neither citizens nor subject to the laws of the state, but are* still the wards of the nation at least so far as concerns the laws regulating the sale of intoxicants."

The entire instruction given to the jury was as follows, (Transcript, page 17.)

> Gentlemen: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him *within the limits of what is known as Nez Perce Indian Reservation*, then you are to find him guilty of this charge. The charge, of course, is for *introducing liquor into the reservation*, but I instruct you that having it in his possession upon the reservation *is conclusive*. When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. *I instruct you as a matter of fact, that Culdesac is within the limits of the reservation.*"

The opinion of the learned District Judge, as well as the instructions to the jury, not only settles the question that the *locus in quo* of the alleged offense charged in the indictment, as well as the facts of the transactions relied upon to support the jurisriction of the court are and were conceded by the government at every step of the proceeding to be, as we have herein contended; but it does more, we are brought face to face with the startling proposition that the *act of* 1887 *is not applicable to the Nez Perce Indians* and that they are *neither citizens nor subject to the laws of the state.*

Not subject to t he laws of the state! Then to what laws are they subject? The tribal community has been disolved, the government no longer maintains any machinery to police the reservation; the Indians are left free to roam at will; ten thousand white settlers, at the invitation of the government, have settled upon the former reservation. Where, if not in the state, is vested the jurisdiction and the power to protect the family and property of those citizens of Idaho?

But to summarize the charge of the Court. The jury is told that "the charge—of course, is for *introducing liquor* upon the reservation, but I instruct you that having it in his *possession* upon the reservation is *conclusive.*"

Applying the doctrine of the learned District Judge to the ten thousand white settlers within the former reservation, each and every one of them who may have a half pint of wine or brandy in their possession, whether it is for medical or household use, or for however needful, innocent, or lawful purpose, is *conclusively presumed* to be *guilty*, and may be sent to the penitentiary.

The conclusion to which this contention leads is an efficient demonstration of the fallacy of the government's provision tha. ..agress intended the act of 1897, 29 Stat. L. 506, under which petitioner is imprisoned, to apply to the lands patented to white settlers. It certainly is a striking illustration of the confusion and anomoly to which a divided sovereignity in matters of police control may lead.

The government contends that the United States has juridiction, because of a clause in the treaty or agreement with the Nez Perce Indians ratified on the 3rd day of May, 1893, providing in substance that the laws of the United

POOR

States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years.

This position seems to me to be entirely untenable. The commissioners who concluded that agreement were appointed pursuant to the act of February 28, 1887, 24 stat. L. 388 and under that statute were given no power whatever to insert such a provision in the agreement with the Indians. It was contemplated under the very act under which the negotiations was authorized that the purpose of the negotiation should be to bring about the dissolution of the tribal relations of the Nez Perce Indians by allotting them lands in severalty, by the acceptance of which, under the terms of said act, they were to become citizens of the United States and subject to the laws of the state of Idaho both civil and criminal. It was contrary to the purpose and spirit of this act, as well as to the policy of the government, that any restrictions should be placed either upon the responsibility of the Indians to the state, or upon the control of the state over the Indians after the acceptance by them of their land in severalty.

Indeed Congress was without ~~conditional~~ Constitutional authority to authorize such an agrement with the Indians or to ratify the clause in question. The effect of such an agreement would be to establish a divided sovereignty of certain definite territory and deprive the state of full police control of its own citizens within its own territory. It would seem, further, that in so far as it attempted to provide for the future police control of the territory ceded, that the clause is void for the additional reason, that it amounts to the government bartering with its own citizens to place a limitation upon its future policy in regard to matters of mere police regulation.

Boyd vs. Alabama, 94 U. S. 650.

New York & N. E. E. vs. Bristol, 151 U. S. 567.

Holden vs. Hardy, 169 U. S. 392.

Nor can the clause in the treaty relating to intoxicating liquors be considered as a contract at all. Upon the ratification of the agreement the tribal relations of the Nez Perces were to be dissolved. The entity of the tribe was destroyed by its very terms.

COPY

The agrement was concluded with the Nez Perces May 1st, 1893, long after Idaho had been admitted as a state as I have hereinbefore considered the effect of the ratification of the constitution of the state of Idaho, and the admission of the state as amounting to a compact between the United States and the state of Idaho, that jurisdiction over Indian lands should be retained by the United States only until the Indian title should be extinguished. And was suggested that Congress could ask not or require the state of Idaho to assume the responsibility of a divided jurisdiction and partial control over Indian lands or Indian reservation within the state. Under the admission act the government could retain absolute jurisdiction or control, or by extinguishing the Indian title, grant absolute jurisdiction and control to the state.

I understand that the government substantially concedes that to give effect to the clause in the agreement with the Nez Perces relating to intoxicating liquors, would divide the sovereignty for the purpose of police control over the territory embraced in the Nez Perce reservation between the state and Federal governments, but argues that it is within the power of Congress to do this, and that the decision of this count in the matter of Heff is not controlling.

We understand the decision of this court In re Huff, supra, to be explicit upon the point that there can be no exception to the rule; that a divided sovereignty for the purpose of police control is an impossibility under our system of government. This court in its decision, pages 506 and 507, In re Huff, supra, states the reason for this rule and cites The Kansas Indians, 5 Wall., 537, holding the Indians must be wholly subject to the United States until clothed with the rights and bound by all the duties of citizens, and United States vs. Dewell, 9 Wall., 41, holding that a police regulation embraced in an act of Congress can only have effect where the legislative authority of Congress excludes territorially all state legislation.

In the last analysis the one vital question at issue in the case at bar is: Can a divided soverignty for the purpose of police control exist under our system of government. We understood this question to have been absolutely settled by this Court in the matter of Heff. An examination of the brief of the Honorable Solicitor General in the matter of Heff, as well

as the decision of the Court therein, shows that all the considerations now urged by the government in favor of qualified citizenship or a divided sovereignty. were substantially urged in the former case, and explicitly passed upon adversely to the government's position. I do not understand that any new doctrine was enunciated by this court in the Heff case, but if there are any decisions of this court holding contrary thereto, certainly those decisions must be considered as overruled or distinguished in as far as they may be urged as precedents for upholding the constitutionality of any law attempting to provide for a qualified citizenship or a divided sovereignty.

Respectfully submitted.

FRANK E. FOGG,
Attorney for Plaintiff in error.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

GEORGE DICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 62.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Plaintiff in error, a Umatilla Indian, was indicted at the May term, 1905, of the United States District Court for the District of Idaho, for introducing liquor, on the 15th day of May, 1905, into the Indian country, "to wit, into and upon the Nez Perce Indian Reservation," in violation of section 2139, Revised Statutes, as amended by the act of January 30, 1897 (29 Stat., 506).

A demurrer to the indictment was interposed and overruled, and the case went to trial. The jury returned a verdict of guilty, upon which, on May 16, 1905, after overruling a motion in arrest of judgment, the court entered judgment that Dick pay a fine of $100 and costs and stand committed until the

fine was paid and that he be imprisoned in the State penitentiary for one year and ten days.

It appears from the record filed in this court in the case of *Whitney, warden of the Idaho State Penitentiary*, v. *Dick*, No. 494, October term, 1905, that Dick was incarcerated in the penitentiary in pursuance of the judgment of the district court on May 16, 1905 (p. 11), and that on August 29, 1905, he petitioned the Circuit Court of Appeals for a writ of habeas corpus and certiorari (p. 1); that that court issued a writ of certiorari to the district court, and upon the return thereto directed, October 2, 1905, that Dick be discharged for want of jurisdiction in the trial court (p. 43). The same record further shows (p. 43) that on October 31, 1905, the Circuit Court of Appeals granted the appeal to this court prayed by Whitney and stayed its judgment pending the final determination thereof, fixing bail at $1,000.

Whitney subsequently applied for a writ of certiorari from this court, which was allowed, and on April 30, 1906, this court rendered judgment upon the case as presented to it upon appeal and certiorari, dismissing the appeal for want of jurisdiction, and upon the certiorari holding that the Circuit Court of Appeals had no authority to issue a writ of habeas corpus or certiorari, and reversing its decision and remanding the case with instructions to quash the writ of certiorari issued and dismiss the petition. (202 U. S., 132.)

Application was then made for a writ of error from this court to the district court, which was allowed by

Mr. Justice McKenna and filed in the district court May 14, 1906. (Rec., 31.)

We are advised by the United States attorney at Boise, Idaho, that Dick served his term of imprisonment, took the poor debtor's oath, and was discharged, but that the fine and costs adjudged against him remain unpaid.

QUESTION PRESENTED.

The principal question raised by the assignments of error, and the only one the Government deems it necessary to notice, is that as to the jurisdiction of the trial court, which is dependent upon the constitutionality of the provision of Article IX of the agreement with the Nez Perces ratified by the act of Congress of August 15, 1894 (28 Stat., 326), subjecting the lands within the Nez Perce Reservation for a period of twenty-one years to all the laws of the United States prohibiting the introduction of liquor into the Indian country.

THE AGREEMENT.

The act of August 15, 1894 (28 Stat., 326), provides:

> SEC. 16. Whereas Robert Schleicher, James F. Allen, and Cyrus Beede, duly appointed commissioners on the part of the United States, did, on the first day of May, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Nez Perce tribe of Indians upon

the Lapwai Reservation, in the State of Idaho, which said agreement is as follows:

Whereas the President, under date of October thirty-first, e ghteen hundred and ninety-two, and under the provisions of the act of Congress entitled "An act to provide for the allotment of lands in severa ty to Indians on the various reservations, and to extend the protection of the laws of the United St.ies and the Territories over the ndians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, authorized negotiations with the Nez Perce Indians in Idaho for the cession of their surp us lands; and

Whereas the Nez Perce Indians are willing to dispose of a portion of the tract of land in the State of Idaho reserved as a home for their use and occupation by the second article of the treaty between said Indians and the United States, concluded June ninth, eighteen hundred and sixty-three:

Now, therefore, this agreement made and entered into in pursuance of the provisions of said act of Congress approved February eighth, eighteen hundred and eighty-seven, at the Nez Perce Agency, by Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and ma!e adults of the Nez Perce tribe of Indians located on said Nez Perce Reservation, witnesseth:

ARTICLE I.

The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to

all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz:

* * * * *

ARTICLE V.

It is further stipulated and agreed that the lands by this agreement ceded shall not be opened for public settlement until trust patents for the allotted lands shall have been duly issued and recorded and the first payment shall have been made to said Indians.

* * * * *

ARTICLE VII.

It is further stipulated and agreed that all allotments made to members of the tribe who have died since the same were made, or may die before the ratification of this agreement, shall be confirmed and trust patents issued in the names of such allottees, respectively.

ARTICLE VIII.

It is further stipulated and agreed that the first per capita payment, provided for in Article VIII [III] of this agreement, shall be made to those members of the Nez Perce tribe whose names appear on the schedule of allotments made by Special Agent Fletcher and to such as may be born to them before the ratification of this agreement: * * *

ARTICLE IX.

It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject

for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

* * * * *

ARTICLE XII.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and other male adults of the Nez Perce tribe of Indians have hereunto set their hands.

Concluded at the Nez Perce Agency, this first day of May, anno Domini eighteen hundred and ninety-three.

ROBERT SCHLEICHER.
JAMES F. ALLEN.
CYRUS BEEDE.
A. B. LAWYER, AND OTHERS.

Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

ARGUMENT.

I.

As to the Jurisdiction of the Court.

The Government is desirous that the court take jurisdiction of this case, as the question of the constitutionality of Article IX of the agreement with the Nez Perces is one which the interests both of the State and the Indians require to be speedily determined.

The fact that plaintiff in error served his term of imprisonment and was released upon taking the poor-debtor's oath would not seem to amount to a complete satisfaction of the judgment, since the judgment for fine and costs still remains unpaid.

Another question which suggests itself on this record is whether the question of jurisdiction alone should have been certified to this court. There is no certificate of such question in this record, and the writ of error having been allowed and filed after the term at which the judgment was rendered, it was not competent for the District Court then to have granted such a certificate. (*Colvin* v. *Jacksonville*, 158 U. S., 456.)

But as this was a case in which the jurisdiction of the court was sustained and the case decided on its merits, and the case involved a constitutional question, it would seem that a writ of error to take up the whole case was allowable under the provision of section 5 of the Circuit Court of Appeals act relat-

ing to "any case that involves the construction or application of the Constitution of the United States." The unconstitutionality of the law under which defendant was indicted was distinctly raised in the motion in arrest of judgment (Rec., 19), and the question of jurisdiction depended upon the constitutionality of Article IX of the Nez Perce agreement.

If the defendant had not made any point as to the jurisdiction of the court, but had simply set up, as he did, in his motion, in arrest of judgment, the unconstitutionality of the statute under which he was indicted, he would undoubtedly have been entitled to come direct to this court upon the whole case.

II.

Heff case not controlling—Question one of citizenship or not.

At the trial evidence was introduced to the effect that the alleged offense was committed at the village of Cul de Sac, an incorporated town of the State of Idaho, which is located upon the land ceded by the Nez Perces to the United States. Prior to the offense this land had passed under the town-site laws to the probate judge of Nez Perce County in trust for the inhabitants of the village.

The decision of this court in the Heff case (197 U. S., 488) is not controlling. The question there was as to the authority of Congress, *after* an Indian allottee had

been made a citizen and put under the jurisdiction of the State, to exercise certain police jurisdiction over him. Here the question is as to the authority of Congress *before* that took place—if it has ever taken place—to reserve a limited jurisdiction over the ceded territory. In this case the matter of citizenship and subjection to State authority, and not the jurisdiction retained by Congress, is really in issue.

At the time the agreement in question was made, May 1, 1893, as well as at the time it was ratified by Congress, August 15, 1894, none of the Nez Perces had received allotments in severalty. A schedule of allotments had been completed and submitted to the Land Office on May 15, 1893. This schedule, with certain exceptions, was recommended for approval by the Commissioner of Indian Affairs on March 18, 1895, and on the following day, March 19, 1895, was approved by the Secretary of the Interior, and patents for said allotments directed to issue.

There can be no dispute about these facts, as they are matters of public record. Attached to the petition for certiorari in the case of *Whitney* v. *Dick*, No. 557, October term, 1905, was a certified copy of the records of the Interior Department showing these facts, a copy of which is appended hereto. The reports of the Commissioner of Indian Affairs also show that no allotments to the Nez Perces were approved or patents issued prior to 1895. (Rep. Com. Indian Affairs, 1893, p. 23; id., 1894, p. 20; id., 1895, p. 19.)

In the report of the Commissioner of Indian Affairs for 1895 it is stated (p. 24):

> The checks for the first payment to the Nez Perces (except in cases where payment is suspended for letters of guardianship, etc.) have been transmitted to the agency for delivery to the Indians entitled thereto; also 1,575 patents to be delivered to allottees. This is in accordance with the agreement ratified by the act of August 15, 1894 (28 Stats., 286). It is expected that all preliminary requirements of the agreement [referring to the provisions of Article V] will be complied with so as to permit the opening of the ceded lands by October 1, if the Department so desires.

As, under the act of February 8, 1887, section 6, citizenship and subjection to the jurisdiction of the State does not attach until "the completion of said allotments and the patenting of the lands to said allottee," it follows that at the time the agreement was made and ratified the Nez Perces were still wards of the nation and the power of Congress to regulate commerce with them had been in no wise impaired. If the stipulations in the agreement are inconsistent with the citizenship and subjection to State jurisdiction provided by the act of 1887, it would seem that the provisions of the act must yield to those of the agreement, since the agreement is the later and more specific expression of the legislative will on the subject.

III.

It was competent for Congress to stipulate that the lands ceded by the Nez Perces should be subject for a definite period to the laws of the United States regulating the introduction of liquor into the Indian country.

At the time the agreement of May 1, 1893, was made and ratified the Nez Perce Indian Reservation, being lands to which the Indian title had not been extinguished, was clearly Indian country within the meaning of the laws of the United States. By Article IX of the agreement it is, in effect, declared that it shall continue to be Indian country for a period of twenty-five years. The authority of Congress so to provide is settled by the decisions of this court.

In *Bates* v. *Clark*, 95 U. S., 204, the court, referring to the lands described as Indian country in the act of June 30, 1834, said (p. 208):

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title it ceased to be Indian country, without any further act of Congress, *unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.*
>
> * * * * *
>
> So in the case of *United States* v. *Forty-three Gallons of Whiskey*, decided at the last term,

> 93 U. S., 188, where this act of 1834 was fully considered; while the court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remained Indian country until they removed from it, the whole opinion goes upon the hypothesis that when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule. When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. *The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made*, by reason of the special clause to the contrary in the treaty, *though within the boundaries of a State.*
>
> It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*

In *United States* v. *Forty-three Gallons of Whiskey* the court said (93 U. S., 197–198):

> The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that the ceded lands would be used to store liquors for sale to the young men of the tribe, and they well knew that if there was no cession they were already sufficiently protected by the extent of their reservation.

Under such circumstances it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State lines. Based as it is exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of State equality.

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a

> treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them and give to the alien the full protection conferred by its provisions. If this result can thus be obtained, surely the Federal Government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

But, it is said, the Nez Perces, having since received their allotments, are by virtue of the act of February 8, 1887, as interpreted by the court in the Heff case (197 U. S., 488), citizens of the United States and subject to the laws of the State of Idaho. Assuming, for the purposes of the argument, that this is so, does that fact necessarily impair the jurisdiction expressly retained by Congress to regulate the introduction of intoxicants upon the ceded lands for a specified period? The stipulation in the agreement to that effect being within the competency of Congress, under the decision in the case last cited, notwithstanding the lands were embraced within the limits and general jurisdiction of the State, should a subsequent change in the political status of one or all of the Indians impair the validity of the stipulation or relieve the United States from its obligation or power to enforce it?

In *United States* v. *Forty-three Gallons of Whis-*

key, supra, the court said that the power of Congress to make treaties with the Indian tribes is coextensive with its power to make treaties with foreign nations. As an illustration of the latter power the court referred to the subordination to treaty stipulations with a foreign nation of State laws regulating the right of aliens to take by descent or devise real property situate therein. The United States of course has no general jurisdiction to regulate the subject of inheritance in the States, but in pursuance of its authority to make treaties with foreign nations it could stipulate to do that which in effect amounted to such regulation, and make aliens competent to take by devise or descent. Applying that principle to the case in hand, the court held the jurisdiction of the State over the territory ceded was limited by the treaty stipulations with the Indians. The State was deemed to have accepted the grant upon the condition named, which condition was held not to be incompatible with the equal rights of the State with the other States of the Union.

It is true that in the present case we have not a treaty made by the President by and with the consent of the Senate, but simply an agreement negotiated in pursuance of and ratified by act of Congress approved by the President. That fact seems, however, immaterial. The power of the United States to deal with the Indians is the same whether exercised by law or treaty. A treaty has no superior force or sanctity to an act passed in pursuance of the Constitution. Both are equally declared to be the supreme law of

the land, anything in the constitution or laws of any State to the contrary notwithstanding. An act of Congress may repeal a treaty, and vice versa. (*Foster* v. *Neilson*, 2 Pet., 253; *Chae Chan Ping* v. *United States*, 130 U.S., 581.) Whether a given subject within the jurisdiction of the United States shall be regulated by law or treaty depends upon the exigencies of the case. But whatever the form of the exercise of the power, both are equally potent.

That Congress, in virtue of the plenary authority over the Indians, may provide for the dissolution of their tribal government and their incorporation as citizens of the United States is not open to question. And that in so doing it may attach conditions to its grant of citizenship would seem equally clear. Its power in this respect is as broad and untrammeled as the power to admit new States into the Union. Qualified citizenship is not inconsistent with the provisions of the Constitution.

In the Heff case the court held that Congress could not, *after* it had conferred citizenship upon an Indian and subjected him to the jurisdiction of the State, reassume jurisdiction over him without the consent of both himself and the State. In the present case Congress has simply provided, while the Indians concerned were still wards of the Government and as a condition of their admission to citizenship, for a retention of jurisdiction in certain matters believed to be vital to their welfare. This condition was made with the consent of the Indians themselves, and if not with the express consent at least with the

acquiescence of the State. Prior to the decision of the Court of Appeals in the Heff case, the State of Idaho never attempted to exercise any police jurisdiction over the Nez Perce Reservation or allottees so far as the introduction and sale of liquor was concerned.

This court has recognized the right of Congress to attach conditions and limitations to its grant of citizenship and subjection to State jurisdiction so far as the property of an Indian is concerned (*United States* v. *Rickert*, 188 U. S., 432; *In re Heff*, 197 U. S., 509, in which cases it was held that the property, real and personal, granted to an Indian allottee, was free from taxation by the State during the trust period).

It is to be noted that this case directly involves only so much of Article IX as relates to the lands of the Nez Perces, ceded, retained, or allotted.

In *Ex parte Viles*, 139 Fed. Rep., 68, the District Court, W. D. Washington, held, as stated in the headnote:

> The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce tribe of Indians, confirmed by act August 15, 1894, 28 Stat., 330, c. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall be subject for a period of 25 years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their

> rights of citizenship pursuant to such agreement, and can not affect the status of one who had previously acquired such rights and had become subject to State laws, so as to give force and validity as to him, to the unconstitutional act of January 30, 1897, 29 Stat., 506, c. 109, making it a crime to sell liquor to Indian allottees.

In that case, which was a habeas corpus proceeding by Viles, who had been convicted of and imprisoned for selling liquor to an Indian to whom an allotment of land had been made in the Nez Perce Reservation, the court said (139 Fed., 70):

> The sole question now to be decided is whether the conviction of the petitioner can be sustained, notwithstanding the decision of the Supreme Court in the Heff case, by reason of the ninth article of the agreement made with the Nez Perce tribe of Indians, above quoted. That agreement, having been confirmed by an act of Congress, has all the force and virtue of law, to the extent of the power of Congress to abridge the rights and privileges of Indians of the Nez Perce tribe to whom allotments of land had been previously made. So regarding it, I am unable to make any application of its provisions to affect the validity of the sentence imposed upon the petitioner. The agreement does not define any crime, nor prescribe punishment, for the act of selling liquor to a Nez Perce Indian. It was made and was confirmed by Congress long prior to the act of 1897 prohibiting the sale of intoxicating beverages to Indian allottees. The act

of the petitioner specified in the indictment as constituting the offense of selling liquor to an Indian is not criminal or punishable under any law previously enacted, and the only argument to be founded upon the treaty is this: That the stipulation in article 9 fixes the status of the Nez Perce Indians as being subject to laws to be enacted in the future, and, they being subject to the power of Congress to enact laws prohibiting the sale of intoxicating beverages, the act of 1897 affects them differently from other Indians not parties to the agreement. *Possibly this argument might be sustained if the Nez Perce Indians received their allotments and acquired the rights of citizenship pursuant to the agreement, and with the limitations assented to in the agreement itself, or by receiving allotments under its terms and conditions;* but the agreement provides for allotments only of certain land to be selected in lieu of and in exchange for allotments previously made, *and the record in this case does not show that the Indian referred to in the indictment selected or received a lieu allotment. It does not appear from the record when he did receive his allotment, and the only presumption on the subject is that his allotment had been made at a time previous to the date of the agreement, and that he was then, by virtue of the act of Congress of February 2, 1887 (24 Stat., 388, c. 119), enfranchised as a citizen of the United States, with all the rights, privileges, and immunities of citizens, and subject to the laws of the State of Idaho.* I understand the decision of the Supreme Court in the

> Heff case as a broad declaration of a fundamental principle—that Congress has no power by special legislation to classify citizens, so as to create race or other distinctions, and subject one class or grade of citizens to police regulations not applicable to all citizens, and incompatible with the reserved power of the States to enact and enforce valid local laws, *and that when an individual has once acquired the rights and privileges of a citizen, and become subject to State laws, his status can not be changed by an act of Congress without his individual consent and the concurrent assent of the State in which he resides* I therefore conclude that the agreement referred to is impotent to give force and validity to the act of 1897, upon which the judgment against the petitioner appears to be founded.

That court thus recognized the possibility of Congress attaching the conditions in question to its grant of citizenship to the Nez Perces, although indulging the erroneous assumption that the Nez Perce Indian referred to in that case had received his allotment and trust patent prior to the ratification of the agreement of May 1, 1893. As above shown, none of the Nez Perces had received trust patents for their allotments until after the ratification by Congress of the agreement of May 1, 1893, and it was not, under section 6 of the act of February 8, 1887, until the completion of the allotments and the issuance of trust patents therefor that citizenship and subjection to State authority should occur.

IV.

If the agreement of May 1, 1893, is in conflict with the act of February 8, 1887, the agreement should prevail.

The agreement states that it is made in pursuance of the provisions of the act of February 8, 1887, and so far as possible, therefore, the provisions of that act should be given effect. But in case of conflict the general provisions of the act of 1887 must give way to the special provisions of the agreement, which, having been ratified by Congress and approved by the President, has all the force and effect of a later statute.

This would unquestionably be so in the case of a conflict between different methods of allotment prescribed by the two statutes.

There can be no question as to the authority of Congress to have provided, in terms, that the Nez Perces should not, by virtue of their allotments, become citizens of the United States and subject to the laws of the State. Hence, if it has provided for a retention of jurisdiction by the United States inconsistent with the citizenship of the Indian and his subjection to State jurisdiction, it has done impliedly and indirectly no more than it could have done expressly and directly. The special provisions in the agreement on this particular subject must, it would seem, override the general provisions in the act of February 8, 1887.

The view that Congress did not intend to confer citizenship upon the Nez Perces is in accord with

its other legislation since the act of February 8, 1887, in regard to the Indians. By the act of January 30, 1897 (29 Stat., 506), it prohibited the sale of liquor to allotted Indians during the trust period, as well as the introduction of liquor upon such allotments during that period, or while a restraint on their alienation existed.

It is true that the court held the first provision unconstitutional in the Heff case. But in order to meet the situation produced by that decision Congress, by an act approved May 8, 1906 (34 Stat., 183), amended section 6 of the general allotment act of February 8, 1887, so as to provide that citizenship and subjection to State authority should not occur until an allottee had received a patent in fee simple for his allotment. Appended is a copy of H. R. Report 1558, which accompanied the bill. The Senate report (No. 1998, Fifty-ninth Congress, first session) was identically the same.

The court will observe that it is not the policy of Congress to treat all Indians alike, either in the matter of citizenship or the tenure of their lands, so that there is nothing incongruous in the view that citizenship was not intended to be conferred upon the Nez Perces.

We are advised that not only the representatives of the Government but the principal men of the Nez Perces desired the insertion of Article IX and the assurances for their protection which it contained. That theirs was no idle fear appears from the fact that since

the unauthorized decision of the Circuit Court of Appeals in this case holding that the Federal jurisdiction was at an end, there has been a general movement of the liquor people into the Nez Perce country.

Nothing was said in the agreement upon the subject of citizenship and State jurisdiction. The Nez Perces were not apparently concerned with those questions. The reports of the Commissioner of Indian Affairs show that they have little inclination to exercise the rights of citizenship with which the Supreme Court of the State has held them to be endowed. (*Wa-la-note-tke-tynin* v. *Carter*, 1898, 6 Idaho, 85, in which case, however, the agreement of 1893 was not referred to.) But they were concerned—vitally concerned—with the liquor question. Can it be that the United States is unable to carry out its compact on this subject, and that the general provisions of the act of 1887, of which the Nez Perces were doubtless ignorant, nullify the express stipulations made to them in the agreement?

In his opinion in this case, after quoting Article IX of the agreement with the Nez Perces, Judge Beatty said (Rec., 26):

> Such are the provisions of this agreement possibly bearing upon the question at issue, and there are no provisions placing such Indians under the laws of the State or making them citizens of the United States. If they are subject to such laws or have such rights of citizenship, it must be by virtue of the act of 1887 and other acts. This agreement was

"accepted, ratified, and confirmed" by Congress, which gives its provisions the same effect as any other law enacted by that body. While, as stated, this agreement recites that it is made in pursuance of the provisions of the other act, it does not follow that all of them are adopted. That act is referred to as the general authority for negotiating with the Indians for the cession of their lands, in pursuance of which this agreement is made. But it must result that any portions of such act which are in conflict with the agreement and later law must yield to it. It may be conceded that the conclusions of the court in the cited case concerning the citizenship of Indians, and their exemption from control of United States police laws and regulations, would apply also to these Nez Perce Indians, if there is no conflict between the acts referred to. While this later agreement or act makes no provision for the citizenship of such Indians, or for their control by such laws, it may still be conceded that the provisions of the other act in such matters would apply to them if their logical results, as construed by said court, would not bring them in conflict with the later law; but this later law on said agreement does provide unequivocally that all the lands within this Nez Perce Reservation shall be subject for twenty-five years to all the United States laws regulating the introduction of intoxicants thereon, and that all the Indian allottees of such reservation, whether under the care of an agent or not, shall for a like period be subject to all such laws prohib-

iting the disposition of intoxicants to Indians. This provision is too plain for doubt, and it can not be made clearer by discussion. It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to the Nez Perce Indians, and that they are neither citizens nor subject to the laws of the State, but are still the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants; but whether that result must follow, or whatever the result, it can not be conceded that this Article IX of the agreement is not to be enforced to its full letter and intent. It was a solemn agreement entered into between the Government and these Indians, who are far above the average Indians in intelligence, and many of whom have had long Christian training and who know the evils of the liquor traffic upon their race. *It is well understood that this provision of the treaty or agreement was especially insisted upon by them for the protection of their people.* For them they desired and asked the intervention of the strong arm of that Government which they with unfeigned

simplicity rely upon, as the child upon its father. I can not think that this provision of a solemn compact, intended to shelter from debauch and destruction a subjected and dependent people, will be so emasculated by judicial construction as to turn loose upon them a vampire class, totally reckless of the Indians' welfare, of law, and of society. Such a result can not be made to appear to the untutored savage as consistent with our contract with them, or with honor. I feel no hesitation in holding that this agreement with the Indians must be enforced, and that this conclusion is not in conflict with the ruling cited by the Supreme Court, in which was not involved any similar statute.

V.

The State has no cause of complaint.

In the act of July 3, 1890 (26 Stat., 215), admitting Idaho as a State, nothing was said as to the Indian lands or reservations. But the constitution formed by the people of Idaho at the time of the admission of the State provided (Article XXI, sec. 19)—

> And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United

> States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.*

This was simply a recognition by the State of the absolute jurisdiction of Congress over the lands of the Indians until the Indian title was extinguished—not an agreement on the part of Congress that upon the extinguishment of the Indian title such absolute jurisdiction should revert to the State. In any event, it was for Congress to determine how the Indian title should be extinguished and the State can not complain if in order to do so it was necessary or desirable to stipulate for the retention of a limited jurisdiction over said lands for a specified period, since it is the ultimate beneficiary of such action.

Moreover, the observance of stipulations of this kind is a political matter for the determination of Congress alone.

The judgment of the District Court, it is submitted, should be affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

WILLIAM R. HARR,
Special Assistant to the Attorney-General.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 30, 1905.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of the certificates attached to the original schedule of allotments made to the Nez Perce Indians in the State of Idaho as the same appear of record in this Office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this Office to be affixed, on the day and year first above written.

[SEAL.] C. F. LARRABEE,
Acting Commissioner.

We hereby certify that the foregoing schedule of allotments (123 sheets) made by us to the Indians residing on the Nez Perce Reservation, Idaho, is correct; that each of the persons therein named is entitled to the lands allotted to him or her. And that the same were selected in accordance with the provisions of the act of Congress approved February

8, 1887, and amended and approved February 28, 1891, and the instructions of the Acting Commissioner of Indian Affairs, approved by the Secretary of the Interior.

ALICE C. FLETCHER,
U. S. Special Agent.
WARREN I. ROBBINS,
U. S. Indian Agent.

MAY 15, 1893.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
March 18, 1895.

The foregoing schedule (embracing 123 sheets) of allotments of lands in severalty made to the Indians on the Lapwai or Nez Perce Reservation in Idaho under the Act of Congress Approved February 8, 1887 (24 Stats., 388), as amended by the Act of February 28, 1891 (26 Stats., 794), by Special Agent Alice C. Fletcher and U. S. Indian Agent W. D. Robbins, under authority of the President dated April 13, 1889, and instructions from the Office approved by the Department, is respectfully submitted to the Secretary of the Interior, with the recommendation that he approve the allotments therein described (except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158,

29

1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629, which are suspended) and cause patents to issue therefor in the names of the allottees as provided in the 5th section of said act of February 8, 1887.

D. M. BROWNING,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 19, 1895.

The allotments to the Nez Perce Indians in Idaho, as described in the above recommendation of the Commissioner of Indian Affairs, are hereby approved (except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158, 1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629, which are suspended) and the Commissioner of the General Land Office is directed to cause patents to issue therefor (except the numbers suspended) in form and of the legal effect prescribed by the 5th section of the act of February 8, 1887.

HOKE SMITH, *Secretary.*

59TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. } REPORT No. 1558.

ALLOTMENT OF LANDS IN SEVERALTY TO CERTAIN INDIANS.

FEBRUARY 21, 1906.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. BURKE, of South Dakota, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 11946.]

The Committee on Indian Affairs, to whom was referred House bill 11946, submit the following report:

The committee have amended the bill and, as amended, recommend that it do pass.

The amendments adopted are as follows:

In line 9, page 1, after the word "of," strike out the words "twenty-five years or," and strike out all of line 10, and insert in lieu thereof the words "the trust period."

In line 1, page 3, after the word "time," insert the word "to."

In line 4, page 3, after the word "removed," add an additional proviso, as follows:

Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

This bill proposes to amend the general Indian allotment law of 1887, and changes section 6 of said act so that hereafter, whenever an allotment of land is made to any Indian, citizenship will be withheld from such Indian during the trust period. It has generally been supposed that where Indians had taken allotments under the general allotting law that they were still wards of the nation and subject to the jurisdiction only of the United States, and in cases where persons were prosecuted for selling liquor to Indians the courts assumed jurisdiction, regardless of whether the Indian had taken an allotment or not, but upon April 10, 1905, the Supreme Court of the United States decided otherwise in a case entitled "Matter of Heff," reported in 197 U. S. Reports, page 488, the opinion of the court being by Mr. Justice Brewer.

In that case Heff was convicted in the district court of the United States in the district of Kansas, under an indictment for having sold certain intoxicating liquor to an Indian and a ward of the Government; upon conviction he was sentenced to imprisonment for a period of four

months and to pay a fine of $200 and the costs of the prosecution. He appealed, and the court of appeals of the eighth circuit sustained the decision of the district court, and he presented an application for a writ of habeas corpus to the Supreme Court. In effect the court holds that under the law, when an Indian takes an allotment, that he then becomes a citizen of the State or Territory in which he may reside and subject to the laws thereof, and is no longer a ward of the nation, subject to the police regulations on the part of Congress. In concluding the opinion the court says:

> We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.
>
> The district court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment.

Mr. Justice Harlan dissented.

Since this decision was rendered there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians, and in the opinion of this committee it is advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive jurisdiction of the United States.

The bill also provides and authorizes the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed, and if that should be done it would follow as a matter of course, under the provisions of this bill, that the allottee would then become a full citizen and no longer subject to the exclusive jurisdiction of the United States.

In the opinion of the committee this provision is advisable, as it will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs.

The bill is recommended very strongly by the Commissioner of Indian Affairs and the Secretary of the Interior, and the reports are herewith submitted and are as follows:

DEPARTMENT OF THE INTERIOR,
Washington, February 14, 1906.

SIR: I am in receipt of your letter of the 16th ultimo, inclosing H. R. 11946, being "A bill to amend section six of an act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,'" and in reply to your request for a report I inclose herewith copy of a letter from the Commissioner of Indian Affairs, dated the 8th instant, in which he suggests several amendments, and says that "if the bill is clarified by the amendments suggested

there appears to be no good ground for objecting to it. The provision for fee-simple patents is especially desirable legislation, and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible method."

The views expressed by the Commissioner of Indian Affairs and the amendments suggested meet with my approval, and the passage of the bill is recommended.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
House of Representatives.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, February 8, 1906.

SIR: I have the honor to acknowledge the receipt, by your reference of January 18, 1906, for report, of a letter from Hon. J. S. Sherman, chairman of the Committee on Indian Affairs, House of Representatives, who incloses a copy of H. R. 11946, entitled "A bill to amend section 6 of an act approved February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.'"

It changes section 6 to read as follows:

"That at the expiration of twenty-five years or thereafter, if the period has been extended by the President, and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made, and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

The act of February 8, 1887 (24 Stats., 388), known as the general-allotment act, provides that after approval of allotments the Secretary of the Interior "shall cause patents to issue therefor in the names of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period. * * *

Section 6 makes every Indian allottee under that act subject to the laws, both civil and criminal, of the State or Territory in which he may reside, immediately upon the issuance of a trust patent, and declares every Indian born within the United States, to whom an allotment shall have been made under any law or treaty, to be a citizen of the United States.

The bill under consideration postpones the time when an allottee taking lands after it is enacted is to become subject to the laws of the State or Territory of his residence and when citizenship is to be acquired until the issuance of the final or fee-simple patent—a period of twenty-five years, which may be indefinitely extended by the President.

Experience has demonstrated that citizenship has been a disadvantage to many Indians. They are not fitted for its duties or able to take advantage of its benefits.

Many causes operate to their detriment. Some communities are too indifferent and others are financially unable to enforce the local laws where Indians are involved. The result is that the newly enfranchised people are free from any restraining influences. Degraded by unprincipled whites, who cater to their weaknesses, no protection is given them, because the United States courts have no jurisdiction and the local authorities do not enforce State laws.

The bill goes further, and makes ample provision to meet all cases where it would be for the best interest of the allottees to make citizens of them. It authorizes the Secretary of the Interior, in his discretion, "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

This provision is perhaps the most important in the bill. It is a long step in the right direction, and the great need of such a provision is apparent under existing law, and it would become all the more urgent if the other provisions of the pending bill should be enacted. There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and to take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of its burdens, while at the same time the number of "wards of the Government" will be gradually reduced. The process, however, is well safeguarded. Before a fee-simple patent is issued the bill makes it the duty of the Secretary of the Interior to satisfy himself of the civic competency of the allottee concerned. Through superintendents, agents, inspectors, and other officers the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant.

In the past the Indian Office has made many recommendations for special legislation authorizing you to gratify the aspirations of individual Indians for citizenship by issuing to them patents in fee for their lands; but as a fundamental principle of good government, special legislation should be avoided and both the Department and members of Congress relieved of the importunities of interested parties for enactment designed to benefit only themselves.

The proposed amendment will not only substitute general for special legislation, but for those allottees who are not fitted for the responsibilities of citizenship it will provide a probationary period during which any who have both the ability and the ambition may prepare themselves for the desired change.

It may be argued that the bill leaves in some doubt the status of those Indians who will be allotted after it becomes law. In cases where the surplus lands are retained and the reservation boundaries kept intact the allottees would doubtless continue wards of the Government and be subject only to the laws of the United States; whereas if the surplus lands be opened to settlement and the reservation substantially abolished, the question of jurisdiction might become a serious one. It would therefore, perhaps, be well to add the following proviso:

"*Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The first part of amended section 6 will not make allottees subject to the laws of the State in which they reside in any case until the expiration of twenty-five years. The proviso to that section contemplates the shortening of the trust period and removes all restrictions as to the sale, incumbrance, or taxation on the issuance of a fee-simple patent. A previous provision of the section makes such patentees citizens of the United States. Although it would probably be held that a person who becomes a citizen of the United States thereby becomes subject to the laws of the State of which he is a resident, I think it would be wiser to remove all doubt by amending the first section by striking out the words "twenty-five years or thereafter, if the period has been extended by the President," and insert in lieu thereof the words "the trust period." Line 1, on page 3, also should have the word "to" inserted after the word "time."

If the bill is clarified by the amendments suggested there appears to be no ground for objecting to it. The provision for fee-simple patents is especially desirable legislation and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible method. It is therefore most heartily recommended that this bill receive your approval.

Very respectfully,

F. E. LEUPP, *Commissioner.*

THE SECRETARY OF THE INTERIOR.

O

DICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 62. Submitted December 3, 1907.—Decided February 24, 1908.

While a State, upon its admission to the Union, is on an equal footing with every other State and, except as restrained by the Constitution, has full and complete jurisdiction over all persons and things within its limits, Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of the State within whose limits are Indian tribes.

Where fundamental principles of the Constitution are of equal dignity, neither must be so enforced as to nullify or substantially impair the other.

While the prohibition of § 2139, Rev. Stat., as amended in 1892, against introducing intoxicating liquors into Indian country does not embrace any body of territory in which the Indian title has been unconditionally extinguished, that statute must be interpreted in connection with whatever special agreement may have been made between the United States

and the Indians in regard to the extinguishment of the title and the retention of control over the land ceded by the United States.

It is within the power of Congress to retain control, for police purposes, for a reasonable and limited period, over lands, the Indian title to which is extinguished, and which are allotted in severalty, notwithstanding that the Indians may be citizens and the land may be within the limits of a State; and twenty-five years is not an unreasonable period.

Under the agreement of May 1, 1893, ratified, 28 Stat. 286, 326, between the United States and the Nez Perce Indians, the United States retained control over the lands ceded for the purpose of controlling the use of liquor therein for twenty-five years, and during that period § 2139, Rev. Stat., remains in force, notwithstanding such lands are within the State of Idaho.

By indictment returned in the District Court of the United States for the District of Idaho, the plaintiff in error, Dick, was charged with the offense of having unlawfully and feloniously introduced intoxicating liquor, whiskey, into the Indian country, to wit, into and upon the Nez Perce Indian Reservation, in the county of Nez Perce, State of Idaho.

The indictment was based upon § 2139 of the Revised Statutes as amended and reënacted by the act of July 23, 1892, 27 Stat. 260, c. 234. That amended section reads: "No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the *Indian country*. Every person who sells, exchanges, gives, barters or disposes of any ardent spirits, ale, beer, wine or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the *Indian country* shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. . . ."

The accused demurred to the indictment upon the following

among other grounds: That at the time charged in the indictment there was no Indian country within the county of Nez Perce or within the District of Idaho, known or designated as the Nez Perce Indian Reservation; that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as the Nez Perce Indian Reservation was, by the act admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the State, been extinguished by the allotment of the lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that such allotments and purchase have been ratified by the public laws and acts of Congress; and further, that the former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in the indictment, been opened for occupation, settlement and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in the indictment, settled and appropriated by citizens of the State; that various townsites within the boundaries of the former reservation had been settled by citizens and that title thereto transferred from the United States to the inhabitants, and that municipal governments, namely, villages, had been organized and were in existence within the boundaries of the former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in the indictment, Indian country, or lands reserved for the use and occupation of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the au-

thority or control in nature of the guardianship of the person. Other grounds of demurrer were assigned, but they need not be here set out.

The demurrer was overruled, and the case went to trial, the accused pleading not guilty. At the close of the evidence he asked the court to direct a verdict of not guilty, but that request was denied and the result of the trial was a verdict of guilty. Motions for arrest of judgment and for a new trial having been denied, the defendant was, on May 16, 1905, sentenced to pay a fine of $100 and costs and to be imprisoned in the penitentiary for the term of one year and ten days.

In order that the grounds of the demurrer may be clearly apprehended it is necessary to bring into view certain legislation by Congress and an agreement or treaty made between the United States and the Nez Perce Indians.

By the act of Congress of February 8, 1887, c. 119, providing for the allotment of lands in severalty to Indians on the various Indian reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, it was provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same, by patent, to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, that the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above

mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; . . ." 24 Stat. 389, § 5.

Section 6 of that act is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of the act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Idaho was admitted into the Union in 1890, act of July 3, c. 656, 26 Stat. 656, the act of admission containing no provision about Indian lands or reservations. But the constitution of Idaho, which Congress accepted, ratified and confirmed, contained this provision: "And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or

held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

In the act of August 25, 1894, c. 290, 28 Stat. 286, 326, 327, 330, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes, will be found the provisions of an agreement between the Nez Perce tribe of Indians upon the Lapwai Reservation in Idaho, from which it appears that in making that agreement the parties proceeded under the authority of the above act of 1887. By that agreement the Indians ceded, sold, relinquished and conveyed to the United States all their claim, title and interest in and to all the unallotted lands within the limits of that reservation, except certain specified tracts, which they retained. The parties stipulated that the land so ceded should not be open for public settlement until trust patents for the allotted lands had been duly issued and recorded and the first payment made to the Indians. Article IX of that agreement has a particular bearing upon this case. It reads: "It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians." The agreement by its terms was not to take effect and be in force until ratified by Congress. It was accepted, ratified and confirmed by the above act of August 25, 1894, c. 290.

Mr. Frank E. Fogg for plaintiff in error:

The United States has no jurisdiction for the purposes of

local police control over territory within a State owned in fee by white citizens of such State, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever. In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the State and outside the jurisdiction of the United States. In these police matters there is no such thing as a divided sovereignty and jurisdiction is vested entirely either in the State or the Nation, and not divided between the two. See *In re Heff*, 197 U. S. 505, which controls this case, in which there exist even stronger reasons for denying to the United States jurisdiction in the premises, because even if the statute in question could be held constitutional, the acts charged do not constitute an offense under the statute.

The acts of Congress under which plaintiff in error was indicted exclude entirely lands that the Government had patented to white citizens without any restrictions whatsoever. By the very terms of the act under which the plaintiff in error was charged, even if the same could be held constitutional, the lands included within the village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian country," as contained in said act.

Congress by the act of ratifying the agreement with the Nez Perces, could not place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

The effect and purpose of the agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations; in fact, the United States, by the act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former

Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves. Unless the sixteen hundred Indians immediately become full citizens of the State of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status is an anomaly suspended in the air between the sovereignty of the State and the sovereignty of the Nation.

There is no such thing as qualified citizenship, for Congress cannot confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the State where they were located, and at the same time deny to the State the right to subject them to the same complete and exclusive police control that it has over its other citizens. *In re Celestene*, 114 Fed. Rep. 551–553; *In re Now-goe-Zhuck*, 76 Pac. Rep. 877–880.

The contention of the Government that the United States has jurisdiction because of a clause in the treaty or agreement with the Nez Perce Indians ratified May 1, 1893, providing that the laws of the United States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years, is entirely untenable. Congress was without constitutional authority to authorize such an agreement with the Indians or to ratify the clause in question. The effect of such an agreement would be to establish a divided sovereignty of certain definite territory and deprive the State of full police control of its own citizens within its own territory. It would seem, further, that in so far as it attempted to provide for the future police control of the territory ceded, that the clause is void for the additional reason, that it amounts to the Government bartering with its own citizens to place a limitation upon its future policy in regard to matters of mere police regulation. *Boyd* v. *Alabama*, 94 U. S. 650; *New York & N. E. E.* v. *Bristol*, 151 U. S. 567; *Holden* v. *Hardy*, 169 U. S. 392.

The Attorney General and *Mr. William R. Harr*, Special Assistant to the Attorney General, for defendant in error:

The *Heff Case*, 197 U. S. 488, is not controlling. The question there was as to the authority of Congress, *after* an Indian allottee had been made a citizen and put under the jurisdiction of the State, to exercise certain police jurisdiction over him. Here the question is as to the authority of Congress *before* that took place—if it has ever taken place—to reserve a limited jurisdiction over the ceded territory. In this case the matter of citizenship and subjection to state authority, and not the jurisdiction retained by Congress, is really in issue.

It was competent for Congress to stipulate that the lands ceded by the Nez Perces should be subject for a definite period to the laws of the United States regulating the introduction of liquor into the Indian country.

At the time the agreement of May 1, 1893 was made and ratified the Nez Perce Indian Reservation, being lands to which the Indian title had not been extinguished, was clearly Indian country within the meaning of the laws of the United States. By article IX of the agreement it is, in effect, declared that it shall continue to be Indian country for a period of twenty-five years. The authority of Congress so to provide is settled by the decisions of this court. *Bates* v. *Clark*, 95 U. S. 204; *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 197, 198.

Even though the Nez Perces, having since received their allotments, should be held to be, by virtue of the act of February 8, 1887, citizens of the United States and subject to the laws of the State of Idaho, that fact does not necessarily impair the jurisdiction expressly retained by Congress to regulate the introduction of intoxicants upon the ceded lands for a specified period.

The stipulation in the agreement to that effect being within the competency of Congress, under the decision in the case last cited, notwithstanding the lands were embraced within the limits and general jurisdiction of the State, a subsequent

change in the political status of one or all of the Indians should not impair the validity of the stipulation or relieve the United States from its obligation or power to enforce it.

The power of Congress to make treaties with the Indian tribes is coextensive with its power to make treaties with foreign nations. *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 197, 198.

It is true that in the present case we have not a treaty made by the President by and with the consent of the Senate, but simply an agreement negotiated in pursuance of and ratified by act of Congress approved by the President. That fact seems, however, immaterial. The power of the United States to deal with the Indians is the same whether exercised by law or treaty. A treaty has no superior force or sanctity to an act passed in pursuance of the Constitution. Both are equally declared to be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. An act of Congress may repeal a treaty, and *vice versa*. *Foster* v. *Neilson*, 2 Pet. 253; *Chae Chan Ping* v. *United States*, 130 U. S. 581.

Congress may provide for the dissolution of Indian tribal governments and the incorporation of the Indians as citizens of the United States. In so doing it may attach conditions to its grant of citizenship. Its power in this respect is as broad and untrammeled as the power to admit new States into the Union. Qualified citizenship is not inconsistent with the provisions of the Constitution. *United States* v. *Rickert*, 188 U. S. 432; *In re Heff*, 197 U. S. 509.

Mr. Justice Harlan, after making the foregoing statement, delivered the opinion of the court.

From the above statement it appears:

That the lands allotted in severalty to Indians in conformity with the act of February 8, 1887, were to be held for the period of twenty-five years by the United States in trust for the sole

use and benefit of the Indian allottee or his heirs, when a formal patent was to be issued by the United States to the Indian or his heirs in fee, free from all charge or incumbrance whatever—such period subject to be extended by the President in his discretion;

That upon the completion of the allotments and patenting of the lands to the allottees, as in that act provided, every member of the respective bands or tribes of Indians to whom allotments have been made was to have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which he resided; also, that every Indian born within the United States, to whom an allotment was made under the act of 1887 or under any treaty, and every Indian born within the United States who had voluntarily taken up within such limits his residence separate and apart from any Indian tribe and adopted the habits of civilized life, was declared to be a citizen of the United States and entitled to all the rights, privileges or immunities of such citizens; and,

That by the agreement of 1893 with the Indians the lands thereby ceded, those retained, *and* those allotted to the Nez Perce Indians, were to be subject for the period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, should for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to the Indians. It also appears that at the date of such agreement it was made an offense against the United States, punishable by fine and imprisonment, for any one either to sell, exchange, give, barter or dispose of ardent spirits, ale, beer, wine or intoxicating liquor of any kind to any Indian under charge of an Indian superintendent or agent, or to introduce or attempt to introduce ardent spirits, ale, beer, wine or intoxicating liquor of any kind into the Indian country.

There are certain facts which the accused insists are decisive in his favor. They are as follows:

1. That the village of Culdesac, although within the boundaries of the Nez Perce Reservation as established before Idaho was admitted into the Union, was, at the time specified in the indictment, an organized village or town of that State.

2. The accused, Dick, is a Umatilla Indian who, at the date of the offense, held and for three years had held an allotment in severalty and also what is called a trust patent. On or about the thirteenth of March, 1905, he purchased at Culdesac five bottles of whiskey, the contents of two bottles of which he and some other Indians drank up. Part of the money paid for the whiskey was furnished by Te-We-Talkt, a Nez Perce Indian, living on the Nez Perce Reservation and holding an allotment and also a preliminary trust patent. Dick gave one bottle of the whiskey to Te-We-Talkt, but afterwards it was taken from the latter by the superintendent and acting agent of the Nez Perce Indians. The purchasing of the whiskey, the giving of the one bottle to Te-We-Talkt and the taking of that bottle from the latter all occurred within the limits of the village of Culdesac. Nothing happened in relation to the transaction outside of the village. The superintendent of the Nez Perce Indians testified: "I do not know of any reservation or any part of the reservation used for Government purposes or for Indian purposes within the boundary of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

3. The lands upon which the village of Culdesac is located were part of those ceded to the United States by the agreement of 1893 with the Indians, and before the above transaction in that village about whiskey occurred the title to such lands had passed by patent from the United States under the townsite laws to the probate judge of Nez Perce County, in trust for the inhabitants of the village. 141 Fed. Rep. 5, 7.

We need not stop to consider the scope, meaning or validity of that part of amended § 2139 of the Revised Statutes, which makes it an offense against the United States to sell, exchange,

give, barter or dispose of ardent spirits, ale, beer, wine or intoxicating liquors "to any Indian under charge of any Indian superintendent or agent." No case is here for trial under that clause of the statute; for, the only charge in the indictment is that the accused unlawfully and feloniously introduced intoxicating liquors into the "Indian country."

Section 2139, as amended and reënacted in 1892, makes it an offense against the United States for any one to introduce intoxicating liquors into the "Indian country," and the offense charged against Dick was the introduction by him of whiskey into that country on the fifteenth day of March, 1905. The transaction out of which the present prosecution arose occurred, as we have seen, within the village of Culdesac, a municipal organization existing under and by virtue of the laws of Idaho, and the parties involved in it were Dick and Te-We-Talkt, who were at that time Indian allottees in severalty and holders of trust patents, and therefore, according to the decision in *Matter of Heff*, 197 U. S. 488, citizens of the United States. If this case depended *alone* upon the Federal liquor statute forbidding the introduction of intoxicating drinks into the Indian country, we should feel obliged to adjudge that the trial court erred in not directing a verdict for the defendant; for that statute, when enacted, did not intend by the words "Indian country" to embrace any body of territory in which, at the time, the Indian title had been extinguished, and over which and over the inhabitants of which (as was the case of Culdesac) the jurisdiction of the State, for all purposes of government, was full and complete. *Bates* v. *Clark*, 95 U. S. 204; *Ex parte Crow Dog*, 109 U. S. 556, 561.

But this case does not depend upon the construction of the Federal liquor statute, considered alone. That statute must be interpreted in connection with the agreement of 1893 between the United States and the Nez Perce Indians. By that agreement, as we have seen, the United States stipulated that the lands ceded by the Nez Perce Indians, and those retained as well as those allotted to the Indians (which embraced all

the lands in the original Reservation), should be subject, for the limited period of twenty-five years, to all Federal laws prohibiting the introduction of intoxicants into the Indian country.

Now, the principal contention of the accused is that the United States has no jurisdiction for purposes of local police control over lands within a State which are owned in fee by white citizens of such State, although they may have been once the property of an Indian tribe and were acquired by the United States subject to the condition that the acts of Congress, relating to a named subject, should remain in force, for a prescribed period, over such territory. We could not allow this view to control our decision without overruling former decisions, the correctness of which, so far as we are aware, has never been questioned. In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

At the date of the agreement of 1893 with the Nez Perce Indians the Reservation upon which they lived was their

property, and they and their lands were subject to Federal jurisdiction, although the lands of that Reservation were within the limits of the State of Idaho which had been previously admitted into the Union upon an equal footing with other States. The future of those lands was a matter to be determined primarily between the Indians owning them and the United States under whose exclusive jurisdiction, at that time, were both the Indians and their lands. The Indians—such is the fair interpretation of the agreement—desired to retain some of their lands, but were willing to cede a part of them to the United States to be allotted in severalty to men of their tribe, provided the lands then constituting the reservation, "those ceded, those retained, *and* those allotted" to the Nez Perce Indians, were protected by the Federal laws prohibiting the introduction of intoxicants into the Indian country. We may assume that they particularly had in mind the lands allotted in severalty, because the allottees, after receiving preliminary trust patents, would become citizens of the United States, and it was necessary that the Indians, remaining on the unallotted and retained lands, should be protected against the pernicious influences that would come from having the allotted lands used by citizens of the United States as a storehouse for intoxicants. Only the authority of the United States could have adequately controlled the conduct of such citizens. If intoxicants could be kept upon the lands of the allottees in severalty, it is easy to perceive what injury would be done to the Indians living on the other lands, who, in order to obtain intoxicating liquor, could go regularly or frequently to the places near by, on some allotted lands, where intoxicants were stored for sale or exchange. Therefore, the provision in the agreement, by which the lands allotted in severalty, as well as those retained and ceded, were made subject (not for all time, but only for a limited period, reasonable in duration) to any Federal statute forbidding the introduction of intoxicants into the Indian country, was one demanded by the highest considerations of public policy, whether we look to the

proper government of the Indian tribes by the United States or to the safety and happiness of the Indians themselves.

This question, as to the validity of Article IX of the agreement of 1893, is, we think, concluded by principles announced in former decisions in this court. A leading case is that of *United States* v. *Forty-three Gallons of Whiskey &c.*, 93 U. S. 188, 193, 195, 197. That was a libel of information by the United States against a lot of whiskey seized and sought to be forfeited by virtue of an act of Congress, approved June 30, 1834, and amended March 15, 1864. The liquors were introduced into an organized village of the State of Minnesota, which village was located upon territory that had been ceded to the United States by a treaty made in 1863 and proclaimed in 1864 with certain bands of Indians. The case proceeded upon the ground that the carrying of the whiskey into the Minnesota village was in violation of an existing act of Congress, making it a crime to introduce spirituous liquors or wines into the "Indian country." The treaty with the Indians, which was involved in that case, provided that the statutes of the United States prohibiting the introduction and sale of spirituous liquors into the Indian country should be the law throughout all the country ceded, until otherwise directed by Congress or the President. In that case the contention was that the place where the whiskey was found was not Indian country; that it ceased to be such when the territory was transferred to the United States; and that the extension, by force alone of the Indian treaty, of the Federal laws relating to lands in an organized county of the State was an infringement of the State's lawful jurisdiction and an invasion of its sovereignty, the State having been admitted into the Union upon an equal footing with the original States.

This court said: "The Red Lake and Pembina bands of Chippewa Indians ceded to the United States, by treaty, concluded October 2, 1863, a portion of the lands occupied by them, reserving enough for their own use. The seventh article is in these words 'The laws of the United States now in force,

or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded until otherwise directed by Congress or the President of the United States.' The ceded country is now part of an organized county of the State of Minnesota; and the question is, whether the incorporation of this article in the treaty was a rightful exercise of power. If it was, then the proceedings to seize and libel the property introduced for sale in contravention of the treaty were proper, and must be sustained. Few of the recorded decisions of this court are of greater interest and importance than those pronounced in *The Cherokee Nation* v. *The State of Georgia*, 6 Pet. 1, and *Worcester* v. *The State of Georgia*, 6 Pet. 515. Chief Justice Marshall, in these cases, with a force of reasoning and an extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the States within whose boundaries they lived; and his exposition was based on the power to make treaties and regulate commerce with the Indian tribes. Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate, and dependent.' Accordingly, treaties have been made and laws passed separating Indian territory from that of the States, and providing that intercourse and trade with

the Indians should be carried on solely under the authority of the United States. Congress very early passed laws relating to the subject of Indian commerce, which were from time to time modified by the lessons of experience. . . . This power is in nowise affected by the magnitude of the traffic or the extent of the intercourse. As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom, and on what terms, they shall deal and what articles shall be contraband. If liquor is injurious to them inside of a reservation, it is equally so outside of it, and why cannot Congress forbid its introduction into a place *near by, which they would be likely to frequent?* It is easy to see that the love of liquor would tempt them to stray beyond their borders to obtain it, and that bad white men, knowing this, would carry on the traffic in adjoining localities, rather than venture upon forbidden ground. If Congress has the power, as the case we have last cited decides, to punish the sale of liquor anywhere to an individual member of an Indian tribe, why cannot it also subject to forfeiture liquor introduced for an unlawful purpose into territory in proximity to that where the Indians live? There is no reason for the distinction; and, as there can be no divided authority on the subject, our duty to them, our regard for their material and moral well-being, would require us to impose further legislative restrictions, should country adjacent to their reservations be used to carry on the liquor traffic with them."

After referring to *United States* v. *Holliday*, 3 Wall. 409, in which it was held that Congress could regulate commerce with the individual members of Indian tribes, the court proceeded: "The chiefs doubtless saw, from the curtailment of their reservation and the consequent restriction of the limits of the 'Indian country' that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew that, if there was no cession, they were already sufficiently protected by the extent of their reservation. Under such cir-

cumstances it was natural that they should be unwilling to sell until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong Government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without state lines. Based, as it is, exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of state equality."

The result in that case was that the whiskey was forfeited because illegally introduced in violation of the treaty with the Indians, and this notwithstanding the place at which it was found and seized was within a State.

In *Bates* v. *Clark*, 95 U. S. 204, 208, 209, the court said that Indian lands ceased, without any further act of Congress, to be Indian country after the Indian title had been extinguished, but it took care to add the qualifying words, "unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case." Referring to the treaty involved in the case of the *Forty-three Gallons of Whiskey*, the court further said: "When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made, *by reason of the special clause to the contrary in the treaty, though within the boundaries*

of a State. It follows from this that all the country described by the act of 1834 as Indian country remains Indian country as long as the Indians retained their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*" See also *Ex parte Crow Dog*, 109 U. S. 556, 561.

Following our former decisions, we adjudge that the agreement between the United States and the Nez Perce Indians, whereby the Indian lands ceded, retained and allotted to the Nez Perce Indians, should be subject (not without limit as to time, but only for twenty-five years) to any Federal statutes prohibiting the introduction of intoxicants into the Indian country, was not liable to objection on constitutional grounds; in which case the demurrer to the indictment was properly overruled, and the plaintiff in error rightfully convicted.

In view of some contentions of counsel and of certain general observations in the case of *Forty-three Gallons of Whiskey*, above cited, not necessary to the decision of that case, but upon which some stress has been laid, it is well to add that we do not mean, by anything now said, to indicate what, in our judgment, is the full scope of the treaty-making power of Congress, nor how far, if at all, a treaty may permanently displace valid state laws or regulations. We go no further in this case than to say that the requirement, in the agreement of 1893, that the Federal liquor statutes protecting the Indian country against the introduction of intoxicants into it should, for the limited period of twenty-five years, be the law for the lands ceded and retained by, as well as the lands allotted to, the Nez Perce Indians, was a valid regulation based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians, and was not inconsistent, in any substantial sense, with the constitutional principle that a new State comes into the Union upon entire equality with the original States. The judgment must, for the reasons stated, be affirmed.

It is so ordered.